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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 641

AETNA LIFE INSURANCE COMPANY,
Petitioner,

vs.

JEANNETTE E. BARNETT AND LEON E. STROPP.

No. 642

AETNA LIFE INSURANCE COMPANY,
Petitioner,

vs.

SAVINGS INVESTMENT & TRUST COMPANY.

No. 643

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Petitioner,*

vs.

JEANNETTE E. BARNETT.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

EDWARD A. MARKLEY,
Counsel for Petitioners.

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vs.

JEANNETTE E. BARNETT.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Aetna Life Insurance Company and The Equitable Life Assurance Society of the United States (hereinafter called defendants) respectfully present this pe-

tition for writs of certiorari to review the final judgments of the United States Circuit Court of Appeals for the Third Circuit rendered December 9, 1943, which affirmed money judgments of the United States District Court for the District of New Jersey in favor of respondents (hereinafter called plaintiffs) and against petitioners (R. 565).

Summary and Short Statement of Matter Involved.

(The references are to Volume I of the appendix unless otherwise noted.)

Three suits entitled as follows were instituted in the New Jersey Supreme Court for the death proceeds of three policies of insurance issued in the amounts noted on the life of Robert J. Barnett (hereinafter called Barnett):

	Relationship of Plaintiffs to Insured.	Amount of Policy.
Savings Investment & Trust Company, a Trust Company, Plaintiff, vs. Aetna Life Insurance Company, a Corporation, Defendant.	Creditor of Insured's company—Discount Corporation of America. Policy assigned absolutely to plaintiff.	$50,000.00
Jeannette E. Barnett and Leon E. Stropp, Plaintiffs, vs. Aetna Life Insurance Company, a Corporation, Defendant.	Jeannette E. Barnett—wife of Insured; Leon E. Stropp—creditor of Insured.	$30,000.00
Jeannette E. Barnett, Plaintiff, vs. Equitable Life Assurance Society of the United States, Defendant.	Wife of Insured.	$5,000.00

They were removed to the federal court because of diverse citizenship and consolidated for trial.

The only issue at the trial was, "is the insured dead?" Plaintiffs submitted no direct proof of insured's death but in lieu thereof proved that insured's wife and close relatives have not seen or heard from him since Dec. 28, 1932. That proof created a presumption that insured died on

~~Feb.~~ Dec. 28, 1939, because of the New Jersey Presumption of Death Statute (N. J. R. S. (1937) 3:42-1), which reads as follows:

> "If a resident or nonresident of this state remains beyond the sea, absents himself from this state or from the place of his last known residence, or conceals himself in this state or in the place of his last known residence, for seven years successively, he shall, whenever his death comes into question, be presumed to be dead, unless it is proved he was alive within that time."

Defendants proved by witness Cutsler that insured is not dead and was seen alive as late as November or December, 1940 (R. 461a). In addition, the following witnesses saw or heard from him since Dec. 28, 1932:

a. Marie Jordan Fosselli (hereinafter called Marie Jordan), a friend with whom insured was carrying on an illicit affair prior to Dec. 28, 1932 (R. 229a, 259a, 263a, 269a). She spoke with him on the telephone in February, 1933 (R. 239a, 241a).

b. Albert H. Starke saw him in New York City in October, 1933, when he used to come to an apartment house on West 12th Street to visit his friend, Raymond Hatch, who had his home in East Orange, New Jersey, and an apartment on West 12th Street for his paramour, Alma Rivers (R. 432a, 427a, 437a).

c. James Joseph Donlon saw him in New York City in the summer, fall and winter of 1934 (R. 445a) when he used to come to an apartment house on East 78th Street to call for Alma Rivers, former paramour of Raymond Hatch who was now dead, having died in the West 12th Street apartment of Alma Rivers (R. 433a).

d. Francis X. Sullivan saw him in New York City in the spring and summer of 1934 (R. 360a, 361a) when he used to come to an apartment house on East 78th Street to call for the same Alma Rivers who lived there with Ruth Baum (R. 365a, 366a).

e. George R. Bradshaw saw him in New York City in the summer of 1939 when he used to come to an apartment house on East 22nd Street to visit the same Ruth Baum who formerly lived with Alma Rivers (R. 407a-409a).

None of the foregoing knew Barnett before his disappearance except Marie Jordan. The identifications made by the witnesses on the stand were made from copies of a photograph (Ex. D-3) which Mrs. Barnett identified as a picture of her husband (R. 71a).

The pertinent facts with respect to Barnett's disappearance from his New Jersey abode are as follows: In July, 1929, he was president of the East Orange Trust Company (R. 112a) when he resigned and organized the Discount Corporation of New Jersey (R. 331a). In 1932, he attempted to obtain stock control of the East Orange Trust Company (R. 176a). He arranged to finance his scheme with plaintiff, Savings Investment & Trust Company. In fact, he apparently thought that he was acting for the Savings Investment & Trust Company in negotiating with holders of the East Orange Trust Company stock (R. 93a). In any event, he failed in his purpose to acquire voting control of the East Orange Trust Company and he found himself hopelessly indebted to plaintiff, Savings Investment & Trust Company (R. 174a, 175a). He instituted suit against that company in an attempt to sustain his contention that that bank was the principal and he was only the agent in the negotiations for the East Orange Trust Company stock (R. 93a). He failed in that suit (Ex. D-11, R. 97a, Vol. II of appendix). In addition to his own obligations to Savings Investment & Trust Company, he had persuaded several of his friends to enter into the scheme with him (R. 174a, 175a, 352a, Ex. D-11, R. 97a, 98a, Vol. II of appendix) and when the New Jersey Chancery Court dismissed his suit to have Savings Investment & Trust Company declared

principal in the plan to acquire the East Orange Trust Company stock, not only did Barnett face financial obliteration but so did his friends, Simpson and Freytag and others. The loss of that suit was a genuine tragedy for Barnett (R. 42a, 92a). The decree dismissing Barnett's suit against Savings Investment & Trust Company was announced orally about two weeks before Barnett absconded (R. 352a) and was actually signed the day before he absconded (R. 351a). When Barnett absconded it was found that the Discount Corporation was hopelessly insolvent (R. 348a). Barnett had complete control of the Discount Corporation. He was in sole charge of the fiscal books and records (R. 332a, 333a), which on search after Barnett absconded were found to have been destroyed (R. 319a, 322a).

After Barnett absconded a receiver was appointed for the Discount Corporation (Exhibit D-10). Defendants offered in evidence the inventory and account of receiver (R. 346a, 347a) for the purpose of showing the extremely hopeless financial condition of Barnett's Discount Corporation. This offer was excluded by the trial judge and his ruling was affirmed by the Circuit Court of Appeals (R. 6 of opinion).

An additional fact surrounding Barnett's disappearance was that Marie Jordan had sent a telegram to his house requesting money (Ex. D-1, R. 71a, Vol. II of the appendix). That telegram came to the attention of Barnett's wife (R. 65a) and the police authorities were informed of it by Mr. and Mrs. Barnett (R. 65a). The affair continued after the demand for money (R. 281a). Therefore, on December 28, 1932, Barnett, who had been a highly respected banker in East Orange, found himself hopelessly in debt, facing discovery of his embezzlements from the Discount Corporation, responsible for the financial ruin of several of his friends who were well regarded businessmen living in East Orange, and furthermore, all those troubles were compli-

cated by the fact that his paramour was indulging in a mild form of blackmail, the instrument of blackmail having been brought to the attention of his wife and the authorities in his place of residence. In this situation Barnett mailed the following letter to his wife on Dec. 28, 1932 (R. 46a-47a):

"Dearest Jen:

"My heart is broken—my spirit is gone and I am almost crazy. I cannot go on.

"For your sake, Dearest, while something is left—I must make the sacrifice—for you and your future. What have you to look forward to with me. You are too good, too wonderful, as you have been a wife and companion, to suffer longer. See H. C.—don't let the insurance lapse, see L. E. S. about this.

"It is your salvation, there should be about $25,000—out of Stropp's balance pay H. C. 7500—Henry 4500 and Ed W. S. $2,500. Take care of Father's $1,500 ($500 old).

"Forgive me and may God bless you and protect you as long as you live.

"Bob."

and took the steamer "Plymouth" to Fall River. When he boarded the boat he had with him a suitcase and a large bundle (R. 119a, 203a). At Fall River, when his stateroom was examined, the following situation presented itself (R. 213a-215a). The window leading to the deck was open, a small chair was near the window, the door was locked and the key was on the inside of the door, clippings with respect to the loss of his case against Savings Investment & Trust Company were on the top berth with his auto license, $20.00 was found in his clothes and $2.55 was on the bureau in the stateroom. All of his clothes were there except his socks and underwear. The suitcase and large bundle were not there. His ticket was not there. The lower berth had been used. His Masonic button was in the stateroom but his ring with his initials was missing.

The ticket which he purchased was for boat passage to Fall River and railway passage to Boston. The practice followed on the boat was to collect the boat part of the ticket on disembarkation. A consideration of the foregoing facts shows that Barnett tried to make it appear that he committed suicide. His attempt to simulate suicide was a very poor one.

In fact, it is so clear that Barnett did not commit suicide that plaintiffs themselves abandoned any claim they had made to suicide (p. 320a) and the trial judge expressly instructed the jury as follows (p. 528a):

> "Now, in this case there has been some evidence of either a real or a feigned suicide. I direct your attention to it because it is my thought that the evidence might confuse you. *These suits, however, are not predicated upon an alleged suicide. The plaintiffs rely, as I have told you, upon the presumption created by statute.* Therefore there is no burden on the plaintiffs to prove that the insured, in fact, took his own life. That evidence is merely a factor for your consideration." (Italics ours.)

The case was submitted to the jury who returned verdicts in favor of all plaintiffs (R. 535a), and judgments were entered for the amount of each policy, plus interest thereon from February 27, 1940, the date on which the alleged proofs of death were submitted to defendants (R. 539a, 544a). Defendants appealed to the Circuit Court of Appeals for the Third Circuit which affirmed the judgments.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under 28 U. S. C. 347 (a). The judgments of the Circuit Court of Appeals of which review is sought were entered thereon on December 9, 1943.

Questions Presented.

1. Since the only issue in the case was, "Is the insured dead?"—Did the trial court err in placing on the defendants the burden of proof on that issue?

2. Did the trial court act contrary to the provisions of 28 U. S. C. 695 in excluding inventory and account of receiver of insured's Discount Corporation of New Jersey?

Reasons for Allowance of Writs.

Petitioners submit the following reasons for the allowance of writs of certiorari to review the judgments of the Third Circuit:

1. The Circuit Court of Appeals in affirming the District Court's instructions to the jury which placed on defendants the burden of proof on the only issue of the case has decided an important question of local law in a way probably in conflict with the applicable decisions of the highest Court of the State of New Jersey.

2. The Circuit Court of Appeals in affirming the District Court's rejection of the inventory and account of receiver (Exhibit D-9) which was clearly admissible under 28 U. S. C. 695 has decided an important question of federal law which has not been but should be considered by this Court.

Wherefore, your petitioners respectfully pray that writs of certiorari issue to the United States Circuit Court of Appeals for the Third Circuit and submit herewith their brief in support of this petition.

Respectfully submitted,

EDWARD A. MARKLEY,
Attorney for Petitioners.

Dated: December 23, 1943.

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Nos. 641-2-3

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AETNA LIFE INSURANCE COMPANY,

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THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

vs. *Petitioner,*

JEANNETTE E. BARNETT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

A.

The Opinion of the Court Below.

The opinion in the Circuit Court of Appeals is not yet reported but is printed in volume one of the appendix (R. 559). No opinion was filed by the District Court.

B.

Jurisdiction.

I.

The jurisdiction of this Court is sustained by Section 240 of the Judicial Code as amended by the Act of February 13, 1925, (U. S. C. A. Title 28, Sec. 347).

II.

The date of the judgment to be reviewed is December 9, 1943 (R. 565).

III.

The grounds on which jurisdiction in this Court is invoked are set forth in the reasons for allowance of writs in the petition.

IV.

Statement of the Case.

The case has been stated under heading "Summary and Short Statement of Matter Involved" in the petition.

Summary of Argument.

Our argument will be divided into the following main points:

1. The only issue in the case was, "Is insured dead?" The local or New Jersey law places the burden of proof on that issue on plaintiffs. It was error to place on defendants the burden of proof on that issue.

2. Since the inventory and account of receiver (Exhibit D-9) was admissible under 28 U. S. C. 695, its rejection as evidence was error.

There were several points argued by us on the appeal to the Circuit which are not raised on this application. Since a large part of the Circuit Court's opinion is given over to matters not raised on this application, we point out that we are not complaining here of the Circuit Court's disposition of the following points made by us on the appeal to the Circuit:

1. Since the statutory presumption of death created by proof of insured's absence from his New Jersey abode was entirely destroyed by defendants' proof that insured was alive after he absconded, the trial court erred in denying defendants' motion for a directed verdict.

2. The trial court erred in excluding proof of the practice on the steamer "Plymouth" with respect to the collection of tickets on disembarkation.

3. The trial court erred in excluding defendants' offer of proof of the criminal complaint and indictment found against insured Barnett.

ARGUMENT.

I.

The only issue in the case was, "Is insured dead?" The local or New Jersey law places the burden of proof on that issue on plaintiffs. It was error to place on defendants the burden of proof on that issue.

The Circuit Court disposed of our contention that the trial judge erred in his charge on the important question of burden of proof by the following short paragraph in the main opinion by McLaughlin, J. (R. 563):

> "The appellants' next point is that the court erred in its charge with respect to burden of proof. They attempt to isolate two sentences from the charge in

> support of this. A reading of the entire charge shows the trial court to have fairly presented this phase of the matter to the jury."

We submit that statement is an attempt to evade our argument rather than answer it. The portion of the charge which we contend is erroneous is not an incomplete excerpt taken out of its context but the following clear and definite statement of the trial court's view of the law (R. pp 527a-528a):

> "You are instructed that under the statute the burden is upon the defendants to prove by a fair preponderance of the evidence that the insured was, in fact, alive within the period."

The error contained in the foregoing is reiterated in another part of the charge when the court said (R. p. 530a):

> "* * * I have instructed you that the burden is on the defendants to establish by a fair preponderance of evidence that the insured was, in fact, alive."

The error was again reiterated in refusing to charge the following requests submitted by defendant (R. p. 536a):

> "3. The burden is upon the plaintiffs to prove by the greater weight of the evidence that the insured in the policies sued upon, namely, Robert James Barnett, is dead.
>
> "4. Before the plaintiffs can recover on the policies of life insurance sued upon, they must first prove by the greater weight of the evidence the death of the insured named in the policies, namely, Robert James Barnett.
>
> "5. Before the plaintiffs can recover they must prove by the greater weight of the evidence that prior to the institution of these suits and prior to February 27, 1940 when they filed their alleged proofs of death with

the defendant companies, that the said insured, Robert James Barnett, was dead.

"6. This burden of proving by the greater weight of the evidence that the said Robert James Barnett was dead prior to the institution of these suits and prior to February 27, 1940 when the alleged proofs of death were filed, is always upon the plaintiffs throughout this case, and that burden of proof never shifts. If you find that the plaintiffs have not borne that burden of proof they cannot recover and your verdict must be for the defendants."

Under the doctrine of *Erie R. R.* v. *Tompkins*, 304 U. S. 64, the burden of proof is substantive and a federal court must in a non-federal matter, such as this case is, follow the applicable state rule.

Cities Service Oil Co. v. *Dunlap*, 308 U. S. 208

Moore's Federal Practice, 1942 Supp. to vol. 3, Sec. 43.02, p. 2041, n. 33; 1942 Supp. to vol 1, Sec. 8.10, p. 571.

Under the law of New Jersey, plaintiffs had the burden of proof throughout the trial and that burden never shifted to defendants. In *Kresse* v. *Metropolitan*, 111 N. J. L. 474 (Court of Errors & Appeals, 1933), Chief Justice Brogan said at page 479:

"It is fundamental that when a plaintiff has established a *prima facie* case the defendant is bound to controvert it by evidence or suffer judgment. When evidence is submitted by the plaintiff on the one hand and by the defendant on the other, then the question arises as to whether the burden of proof has been sustained by the plaintiff upon whom it has rested from the beginning. *It is not shifted by the proceedings during the trial, and the jury should be instructed that all material facts tendered by the moving party must*

be established by that party by a preponderance of the evidence.''

To the same effect are:

State v. *Giordano,* 121 N. J. L. 469

Carroll v. *Prudential,* 125 N. J. L. 397

Schlosser v. *Goldberg,* 123 N. J. L 470 (Supreme Court, 1939).

In the last named authority Chief Justice Brogan said at page 473:

> ''The plaintiff has the burden of proving his case and we think that no citation of authority is required for that fundamental proposition.''

See also:

Cramer v. *John Hancock,* 18 N. J. Misc. 368 (Atlantic County Circuit Court, 1940);

Kopacka v. *Roman & Greek Catholic Gymnastic Slovac Union Sokol, supra,* at 589;

Cvelich v. *Erie,* 120 N. J. L. 414 (Supreme Court, 1938), at 416;

Lodge—Evidence in New Jersey Practice (1942), Sec. 235.

In *Cella* v. *Roth,* 113 N. J. L. 458 (Court of Errors & Appeals, 1934), Wells, J., speaking for a unanimous court, said at page 463:

> ''The burden of proof never shifts from the one asserting a cause of action. If the plaintiff makes out a *prima facie* case and the defendant offers an explanation which leaves the jury in a state of equipoise on the question of negligence, the defendant is entitled to a verdict. He is never under a duty of showing by the weight of the evidence that he is innocent of negligent conduct. The defendant did not have to prove

by the weight of the evidence that another was guilty but was entitled to be relieved of liability if he showed enough to make the jury feel that his negligence was not proved by the greater weight of the evidence."

In *Hughes* v. *Atlantic City*, 85 N. J. L. 212 (Court of Errors & Appeals, 1914), Swayze, J., speaking for a unanimous court, said at page 213:

"The learned trial judge in view of the high degree of care required of a carrier of passengers told the jury that 'when an accident of this kind happens to some of the means of transportation, *the law shifts the burden of proof from the plaintiff as to the explanation or showing the actual cause to the defendant, and imposes upon it the burden of making an explanation exculpating itself from negligence.*' The question he put to the jury was: 'Has the defendant done that?' To leave no doubt of his meaning he added: 'The explanation is one that you must pass upon, whether or not the burden which the law casts upon the defendant in a case of injuries, an accident of this kind, has been met. If it has, then, of course, the negligence that the law would infer from the proof of the facts of the accident and the nature of it, does not exist, and the company would not be answerable at all.'

"*The effect of this charge was to relieve the plaintiff from the duty to satisfy the jury by the preponderance of the evidence that the defendant had been negligent, and to deprive the defendant of his right, which we have said is a substantial one,* to have the plaintiff bear the burden of the affirmative. *Bien* v. *Unger*, 35 Vroom 596; *McGilvery* v. *Electric Light and Power Co.*, 34 Id. 591. *The learned trial judge distinctly said that this burden shifted to the defendant and he did not even submit to the jury the question whether the plaintiff had established negligence;* he treated that as a matter of legal inference and only left to the jury to say whether the defendant had exculpated itself. *He thus put upon the defendant in a case where there was no direct evidence of negligence*

a burden from which it would have been free in a case where there was direct evidence.''

In *Nieble* v. *Winslow*, 83 N. J. L. 191 (Court of Errors & Appeals, 1915), Garrison, J., speaking for the court, said at pages 192, 3:

''The trial judge in the body of his charge repeatedly told the jury that the burden of proving the negligence of the defendant was upon the plaintiff, and explained that the burden of proof meant the duty of establishing negligence by a preponderance of the evidence. After the delivery of these correct instructions, the court charged certain requests preferred by plaintiff's counsel and not withdrawn after hearing the charge, one of which was: 'If you find that the gauze was left in the abdomen of the plaintiff, and the incision sewed up, or allowed to heal up over it, the burden of proof is on the defendant to show that it was not left there by any carelessness or negligence of his.' This was error. Neither the single fact nor the group of facts stated in this request shifted to the defendant the burden of proof which, notwithstanding such facts, remained with the plaintiff. The facts recited in the request were a part of the plaintiff's case, in that they were steps in the establishment of the negligence of the defendant, the burden of proving which was upon the plaintiff; the effect, therefore, of the request was that the jury was told that if the plaintiff had established these steps in its proof of the defendant's negligence, the burden of exculpating himself from the complete charge of negligence was shifted to the defendant.

''This was the precise error for which this court recently reversed the judgment in the case of *Hughes* v. *Atlantic City Railroad Co.*, 85 N. J. L. 212, where the jury was instructed that if the plaintiff proved that he had been injured by the bursting of an electric light bulb, *the burden shifted to the defendant* to exculpate itself from the charge of negligence. The doctrine of *res ipsa loquitur* happened to be involved in that case, but Mr. Justice Swayze, in his opinion, said: 'He (the

trial judge) thus put upon the defendant, in a case where there was no direct evidence of negligence, *a burden from which it would have been free in a case where there was direct evidence.*' The concluding words correctly state the rule applicable to the present case.

"*The same rule is discussed and admirably stated by Mr. Justice Pitney in a recent case in the United States Supreme Court. Sweeney* v. *Erving,* 228 U. S. 233.

"The direct violation of this rule in the present case cannot be condoned upon the ground that plaintiff's counsel may have had in mind the evidential rule as to the duty of going forward with the testimony to overcome a presumption or a *prima facie* case made during the trial. If so, the language of the request was singularly inept for such a purpose; moreover, after the evidence is all in and the jury is being instructed as to its duties in arriving at a verdict, 'the burden of proof' has a fixed and definite meaning. It is not a question of words or of mere form of expression but of a very substantial and fundamental right; as was said by this court in *Bien* v. *Unger,* 64 N. J. L. 596, 'This right of the defendant to have his plaintiff bear the burden of the affirmative is a substantial one and not a mere matter of form'."

We therefore respectfully submit that under the law of New Jersey plaintiffs had the burden of proof to sustain the affirmative of the issue in this case, i. e., "Is insured, Barnett, dead?". That burden remained with plaintiffs throughout the trial and did not shift to defendants. The law of New Jersey placing the burden of proof on plaintiffs is the now prevailing rule in this country and is supported by the following authorities:

Sweeney v. *Erving,* 228 U. S. 233 (United States Supreme Court, 1913);

In re Locust Bldg. Co., Inc. (C. C. A. 2d, 1924), 299 F. 756, at 763;

Falstaff Brewing Corporation v. *Thompson* (C. C. A. 8th, 1937) 89 F. 2d 557, at 561. Cert. den. 302 U. S. 709;

Florida Fruit Canners v. *Walker* (C. C. A. 5th, 1937), 90 F. 2d 753, at 758. Cert. den. 302 U. S. 738;

Equitable Life Assurance Society v. *MacDonald* (C. C. A. 9th, 1938), 96 F. 2d 437. Cert. den. (1938) 305 U. S. 624;

Mutual Life v. *Blodgett* (C. C. A. 4, 1942), 126 F. 2d 273;

Watkins v. *Prudential* (1934), 315 Pa. 497, 173 A. 644, 95 A. L. R. 869;

U. S. A. v. *Tot*, 131 F. 261, rev. on other grounds 319 U. S. 463;

1 Greenleaf (16th ed. 1899), Sec. 14 (x) (3), p. 105. Also Sec. 14 (w) (2) (c'), p. 101, 2;

Wigmore on Evidence (3d ed. 1940), Secs. 2489, 2531;

Thayer, A Preliminary Treatise on Evidence at the Common Law, p. 339. Also p. 355, et seq.;

Moore's Federal Practice, 1942 Supp. to vol. 3, p. 3070, n. 30;

Couch on Insurance, Sec. 2172.

The New Jersey Court of Errors & Appeals has clearly shown by its decision in *Louden* v. *Louden*, 114 N. J. E. 242, that it does not look with favor upon a rule of evidence which permits a verdict to be based on a fact which is presumed but which clearly does not exist. While the "Presumption of Death Statute" permits a presumption that a person is dead, upon proof that he has absented himself from his last known residence, the statute, as applied to this case, probably permits a presumption contrary to fact. Although it is true that the statute must be permitted to operate as a rule of convenience, there is no reason why its effect should be extended to place on defendants the burden

of proof on the only issue in the case. In *U. S.* v. *Provident Trust Co.*, 291 U. S. 272, the United States Supreme Court disapproved a rule of law which permitted an arbitrary presumption to subvert the truth.

The trial judge first instructed the jury that "the burden is upon the plaintiffs to prove by a fair preponderance of the evidence the facts essential to the right of recovery" (p. 526a). Then he contradicted that instruction by saying (p. 527a): "You are instructed that under the provisions of the statute the burden is upon the plaintiffs *in the first instance* to prove not actual death but absence of the insured from either the state or his place of residence for a period of seven years, etc." Why was this burden upon the plaintiff only in the first instance? This burden rested with the plaintiff throughout the case. In fact the burden was heavier than the Court charged because the burden was to prove death and the statute was only important in so far as it provided one method and one alone of proving death by what the law regards as the equivalent of such proof.

The Court then again contradicted the first instruction which was proper, by saying (p. 527a): "You are instructed that under the statute the burden is upon the defendants to prove by a fair preponderance of the evidence that the insured was in fact alive within the period." No doubt the trial court was led into this error and into this contradictory charge by the instructions submitted by counsel for the plaintiffs (pp. 535a, 531a). The trial court attempted to combine the requests of the plaintiff and the requests of the defendant on the question of the burden of proof but they were irreconcilable. This attempt to reconcile is apparent from the instructions of the court (pp. 529a, 530a) where he said:

> "As I stated to you, in the first instance, the burden is on the plaintiffs to establish the elements essential

> to recovery by a fair preponderance of evidence, and I have instructed you that the burden is on the defendants to establish by a fair preponderance of evidence that the insured was, in fact, alive. Now, the question of weight is related to the fair preponderance of evidence."

If the burden was on the plaintiffs not only in the first instance but throughout the trial and on the whole case to establish the elements of their case essential to recovery by a fair preponderance of the evidence, then the burden could not be upon the defendants to establish by a fair preponderance of the evidence that the insured was in fact not dead. The fact that part of this instruction was correct does not cure the error but rather emphasizes it. Unless we conceive of our trial system as one in which the jury is clothed with capacity to decide between two judicial statements of the law and unerringly to select the correct statement and to disregard the incorrect, the error of the charge was not cured or rendered non-injurious. The Court of Errors and Appeals of New Jersey in *State* v. *Erie R. R. Co.*, 84 N. J. L. 661 at 666 (in reversing the trial court) held:

> "If a judge makes a mistake in charging the jury, he may undoubtedly cure it by calling attention to it as a mistake and directing the jury to disregard it or to substitute for it a later statement of the law. Nothing of that sort was done in the present case, where the most that can be said is that two statements of the law were made to the jury, one of which was erroneous. Unless we conceive of our trial system as one in which the jury is clothed with the capacity to decide between two judicial statements of the law and unerringly to select the correct statement and to disregard the incorrect, the error of the charge in the present case was not cured or rendered non-injurious to the defendant who excepted to it."

See also:

Deserant v. *Cerillos Coal R. Co.*, 178 U. S. 409, at 420, 1;
M'Clung v. *Ross*, 18 U. S. 116, 5 L. Ed. 46, at 50;
Western Union Telegraph Co. v. *Hudson* (C. C. A. 9th, 1936), 82 F. 2d 992 (See particularly the concurring opinion of Wilbur, C. C. J., at 998;
Cummings v. *Pennsylvania R. R. Co.* (C. C. A. 2d, 1930), 45 F. 2d 152;
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Niebel v. *Winslow, supra*, at 194;
State v. *Clayton* (Court of Errors & Appeals, 1912), 83 N. J. L. 673, at 675, 6;
Cella v. *Roth*, 113 N. J. L. 458;
McLaughlin v. *Damboldt*, 100 N. J. L. 127;
Randall's Instructions to Juries, p. 766, sec. 427;
Branson's Instructions to Juries, Sec. 89.

We, therefore, respectfully submit that the Circuit Court of Appeals in affirming the district court's instructions to the jury which placed on defendants the burden of proof on the only issue of the case, has decided an important question of local law in conflict with the applicable decisions of the highest court of the State of New Jersey and petitioners' application for a writ of certiorari should be granted.

II.

Since the inventory and account of receiver (Exhibit D-9) was admissible under 28 U. S. C. 695, its rejection as evidence was error.

After Barnett absconded, a receiver was appointed by the New Jersey Chancery Court for his company, The Dis-

count Corporation of New Jersey. The receiver filed in the Chancery Court an inventory and account which contains cogent evidence with respect to the hopelessly insolvent condition of insured company. The contents of the report may be summarized as follows:

On the second page of the report (p. 87a, Part II) the receiver solemnly states under oath:

> "Deponent states further that most of the important records of account were missing from the office of the said company and deponent believes that the attached audit, made by John W. Fahr, Certified Public Accountant, is the best record available as to the accounts of the said company."

On page 3 of the report, which is the certificate of one of the appraisers (p. 88a, Part II), that appraiser solemnly states under oath:

> "The annexed audit of the book accounts of the Discount Corporation of New Jersey, as made by John W. Fahr, Certified Public Accountant, was accepted by the said Lewis H. Starkey and me as the best information obtainable under the circumstances as many of the records in said office were missing."

The report of the Certified Public Accountant who was retained by the receiver to examine the books and records of Barnett's Discount Corporation of New Jersey, which report is made part of the inventory and account of the receiver, contains the following pertinent facts (90a, 91a, Part II):

> "In accordance with your request, I have made an examination of the records of the Discount Corporation of New Jersey to determine its financial condition as of January 24, 1933, the date of your appointment as receiver.

"The conclusions arrived at are not complete and cannot be made so at the present time owing to the following reasons:

1. A complete set of records was never made.
2. All cancelled checks and bank statements are missing.
3. All check books and stubs are missing except

   Savings Investment and Trust Co. from July 6, 1932 to January 24, 1933.
   Essex County Trust Co. from July 3, 1929 to September 4, 1930.

4. Minute Book not kept after September 3, 1930.
5. Cash receipts not complete for 1932.
6. No record of cash disbursements for 1932.
7. Errors and omissions in record extant.
8. Incomplete correspondence files.

"From the above it will be seen that prior to the disappearance of Mr. Robert J. Barnett, the president, about December 23, 1932, he apparently destroyed all the records of the corporation which were under his control.

"From a comparison of the records extant and copies of bank statements, there was revealed during 1931 and 1932 many deposits and checks of comparatively large amounts which cleared through the banks, and for which no apparent entries were made in the corporate records. The checks exceeded the deposits by over $50,000.00. I have been unable to get any definite information concerning the nature of these transactions. The net result however proves that the records extant are not complete nor reliable. Of the transactions handled entirely by Mr. Barnett personally there is no existing records.

"In the accompanying Statement of Known Assets and Liabilities and Deficit at January 24, 1933, I have only included such items as can be established with some degree of accuracy."

The Statement of Known Assets and Liabilities and Deficit prepared by the Certified Public Accountant which is part of D-9 (p. 92a, Part II) shows a deficit of $45,300.75 in a corporation which had total assets of $31,158.85.

There can be no question about the materiality about the evidence contained in Exhibit D-9. The law is well settled in all jurisdictions that any fact or circumstance relating to Barnett's character, habits, condition, affections, attachments, prosperity and objects of life, which usually control the conduct of men and are the motives of their actions, was, so far as it tended to characterize his disappearance or throw light on his intentions, competent evidence on the ultimate question—"Is insured Barnett dead?"

Meckert v. *Prudential Ins. Co.*, 114 N. J. L. 320;
Tyrrell v. *Prudential Ins. Co.*, 109 Vt. 6;
In re: *Wagener*, 128 N. Y. S. 164;
Petition of Talbot (Supreme Judicial Court of Massachusetts, 1925), 250 Mass. 517, 146 N. E. 1 at p. 2;
Wilson v. *Prudential Ins. Co.* (Supreme Judicial Court of Maine, 1933), 166 Atl. 57 at p. 59;
Butler v. *Mutual Life* (Court of Appeals of New York, 1919), 225 N Y. 197, 121 N. E. 758 at p. 760;
Penn. Mut. Life Ins. Co. v. *Tilton* (10 C. C. A. 1936), 84 F. (2d) 10;
Equitable Life Assurance Society v. *Sieg* (C. C. A. 6th, 1931), 53 F. 2d 318 at 319;
Fuller v. *New York Life Ins. Co.* (C. C. A. 3d, 1912), 199 F. 897 at 899;
Southland L. Ins. Co. v. *Norwood*, 76 S. W. 2d 166;
Equitable Life Assurance Society v. *James*, 73 Ind. App. 186, 127 N. E. 11 at 12;
O'Kelly v. *Felker*, 71 Ga. 775;
Appleman—Insurance Law and Practice, Volume 2, Section 722, note 9, *et seq.*;

Chamberlayne—Modern Law of Evidence, Volume 2, Section 1117;
Lawson—Law of Presumptive Evidence, Rule 53, p. 294;
Stephen—Digest of Law of Ev., art. 99;
Couch on Insurance, Sec. 2228 n. 14 *et seq.*, pp. 7226, 7;
Annotation, 44 A. L. R. 1488;
Rule 43 (a), Federal Rules of Civil Procedure.

The inventory and account of the receiver was competent evidence under 28 U. S. C. 695 which reads as follows:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind. (June 20, 1936, c. 640, § 1, 49 Stat. 1561.)"

This court had occasion to consider that statute in *Palmer* v. *Hoffman*, 318 U. S. 109, but the evidence sought to be introduced in that case differed essentially from the document rejected in the case *sub judice*. We respectfully submit that the question as to whether or not the inventory and account of the receiver (Exhibit D-9) should have been admitted by the court below presents an important question

of federal law which has not been but should be decided by this court.

The interpretation placed on 28 U. S. C. 695 by Clark, C. C. J., speaking for the Second Circuit in *Ulm* v. *Moore-MacCormack Lines* (1940), 115 F. (2d) 492, and *idem* (1941) 117 F. (2d) 222, sustains the competency of the exhibit.

Exhibit D-9 offered by defendants was the original document filed in the New Jersey Chancery proceedings by the receiver. It was brought from the Chancery office by one of that Court's representatives. There is no question involved herein with respect to whether the document was properly authenticated under Rule 44 of the Federal Rules of Civil Procedure. When the receiver Ellis, the appraiser Campbell, and the accountant Fahr made up the inventory and account which was rejected in its entirety by the trial Judge there was absolutely no possible motive for any of them to misstate any facts and the rejection of the document was not in accordance with the spirit of the recent decision of this court in *Palmer* v. *Hoffman*, 318 U. S. 109. Any reasonable person would believe the statements of the receiver Ellis, the appraiser Campbell and the accountant Fahr which are contained in the report in any matter however grave and serious. Certainly the inventory and account would be accepted at its face value by any competent businessman. Title 28 U. S. C. 695 and Rule 43 (a) of the Federal Rules of Civil Procedure, clearly provide that it should be admitted in evidence and its rejection by the trial Judge constituted a narrow, legally erroneous ruling which has done great harm to defendants.

Hoffman v. *Palmer* (C. C. A. 2d, 1942), 129 F. 2d 976;

Freedman v. *Mutual Life* (Supreme Court of Pennsylvania, 1941), 342 Pa. 404, 21 Atl. (2d) 81, 85, 135 A. L. R. 1249;

In re: *Fennerstein's Champagne*, 3 Wall. 145, 18 L. Ed. 121, 70 U. S. 145;

United States v. *Quick* (C. C. A. 3d, 1942), 128 F. 2d 832;

Overfield v. *Pennroad Corporation* (D. C. E. D., Pa., 1941), 42 F. Supp. 586, at 628;

Dissenting opinion of Cardozo, J. in *Great Northern Ry.* v. *Washington*, 300 U. S. 154, at 172, et seq.;

United States v. *Mortimer* (C. C. A. 2d, 1941), 118 F. 2d 266, cert. den. 314 U. S. 616;

5 Wigmore on Evidence, 3d ed. 1940, Sec. 1530;

Morgan et al.—The Law of Evidence, Some Proposals for Its Reform (1927), c. 5.

Despite the contention of plaintiffs that all the evidence sought to be proved by defendants through Exhibit D-9 was already before the jury, the fact is that the following statements contained in the report of the Certified Public Accountant Fahr were not proved in any other way:

1. A complete set of records of the Discount Corporation of New Jersey was never made.
2. All cancelled checks and *bank statements* were missing.
3. All check books and stubs were missing except Savings Investment & Trust Company from July 6, 1932 to January 24, 1933, and Essex County Trust Co. from July 3, 1929 to September 4, 1930.
4. The minute book for the corporation was not kept after September 3, 1930.
5. The cash receipts were not complete for 1932.
6. There were errors and omissions in records extant.
7. The correspondence files were not complete.

All of the foregoing facts would have a definite bearing on the issue as to whether or not Barnett is dead or is in hiding. The defendants were entitled to the benefit of the

high quality of proof of the foregoing matters in the solemn report of the receiver for the Discount Corporation of New Jersey presented to the Chancellor of New Jersey in the insolvency proceedings. It is difficult to conceive evidence of a higher quality than that contained in Exhibit D-9 and it is unfair to the defendants to require them to pay a judgment resulting from a trial in which they were not permitted to present this evidence to the jury.

In its opinion the Circuit Court of Appeals treats the question as follows:

> "The appellants offered in evidence a copy of the inventory of this particular company called 'The Discount Corporation.' It was offered for the purpose of showing that the company was insolvent at the time the assured disappeared. That fact was already in this trial record; the decree of the Court of Chancery to that effect being in evidence. The inventory contained conclusions of appraisers and an auditor."

In *Equitable* v. *Sieg*, 53 F. (2d) 318, the Circuit Court of Appeals for the Sixth Circuit had before it a similar problem in a disappearance case. That court said at page 319:

> "Appellants also assert error in the exclusion by the court, over the objection of the defendants, of secondary evidence as to the alleged amount of the defalcation of Joseph L. Sieg. Witnesses were permitted to testify that Sieg's shortage was 'in excess of several thousands of dollars,' but the fact that it was in excess of $12,000 was excluded. The books of account had since been lost, but there was available the testimony of one Verne George, who had come to Pittsburgh and had taken over the office of Sieg's employer there on the day following Sieg's disappearance. The books were audited at that time under Mr. George's supervision, as well as by the firm of Zopher L. Jensen & Co. on behalf of the sureties. The report of the latter company to the United States Fidelity & Guaranty

Company, surety for the period from July 1, 1920, through December 17, 1920, showed an amount of defalcation during that period, after specific deductions, in an amount in excess of $6,000. Testimony of Mr. George was offered to the effect that separate audits likewise disclosed a defalcation prior to July 1, 1920, in the amount of at least $6,000, which was paid by the National Surety Company. While the summary of an accountant of an examination made by him is ordinarily inadmissible except upon production of the books and documents from which such summary was made, and an opportunity for opposing counsel to examine or use such books to verify the correctness of the accountant's report, the books here involved were lost and could not be produced. The witnesses were wholly disinterested as concerned the then present controversy. At the time of his disappearance the insured was indebted at the bank in an amount of nearly $3,000. His salary was $5,000 per year, and he had less than $100 in cash. He had tried to borrow money, and had failed. The evidence offered thus constituted not only the best evidence available, but the only means of establishing a defalcation, which, to a man with a family and in the circumstances above recited, must have seemed staggering in amount. To permit evidence that the defalcation was 'in excess of several thousand dollars,' which the plaintiff attempted to meet by testimony that the insured might have borrowed money in a 'reasonable amount' had he desired to do so, was to deprive the defendants of a large measure of the probative value of their evidence. This demonstrates the prejudice thereby suffered."

We respectfully submit defendants were entitled to have presented to the jury the inventory and account of receiver. The offering in evidence of a decree of insolvency is not a substitute for the positive proof contained in D-9 showing the extremely hopeless financial condition of Barnett's Discount Corporation of New Jersey. The colloquy (pp.

344a-347-a) which followed the offer of Exhibit D-9 is also important. It reflects the attitude of the trial Judge which was contrary to the letter and spirit of Rule 43 (a) and 28 U. S. C. 695. Plaintiffs argued in their briefs filed below that Exhibit D-9 was offered merely to show insolvency on the part of Barnett's company. This is not so, as appears from the statements of defendants' trial counsel (p. 346a):

> "Mr. Markley: The purpose of it is—it is the report of the receiver who was put in charge by the Court—of what assets the company had. Now, your Honor of course knows *that I have tried to prove the lack of assets, and the objection has been that it wasn't accurate for me to prove, because the people didn't know what assets they had. I asked that of Simpson and I asked that of the previous witness, Van Cleve. Now, here I am in the position to offer demonstrative evidence of what assets and what liabilities this company had, and that is the purpose of the offer of this report of the receiver and his accounts.* Of course, if your Honor feels that that isn't proper I bow to your Honor's ruling."

For the foregoing reasons we respectfully submit that the Circuit Court of Appeals in affirming the district court's rejection of the inventory and account of receiver (Exhibit D-9) which was clearly admissible under 28 U. S. C. 695 has decided an important question of federal law which has not been but should be considered by this Court.

Wherefore, it is respectfully submitted that the writ of certiorari prayed for should be granted.

EDWARD A. MARKLEY,
Attorney for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 641.

AETNA LIFE INSURANCE COMPANY,
Petitioner,

vs.

JEANNETTE E. BARNETT and LEON E. STROPP.

No. 642.

AETNA LIFE INSURANCE COMPANY,
Petitioner,

vs.

SAVINGS INVESTMENT & TRUST COMPANY.

No. 643.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner,

vs.

JEANNETTE E. BARNETT.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS, JEANNETTE E. BARNETT AND LEON E. STROPP.

IN OPPOSITION TO PETITION AND BRIEF FOR WRITS OF CERTIORARI.

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Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Third Circuit, which is printed in the record (R. 559-565), is reported in 139 F. 2d (Adv. Op.) 483. No opinion was filed by the District Court of the United States for the District of New Jersey.

Statement of Jurisdiction.

The judgments of the Circuit Court of Appeals were entered on December 9, 1943 (R. 565-567). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A., Title 23, Sec. 347).

In the petition (Pet., p. 8) the reasons submitted for the allowance of the Writs of Certiorari are as follows:

1. The Circuit Court of Appeals in affirming the District Court's instructions to the jury has decided an important question of local law in a way probably in conflict with the local decisions.

2. The Circuit Court of Appeals in affirming the District Court's rejection of an inventory and account of receiver (Ex. D-9, p. 86A, Vol. II, offered R. 347a) has decided an important question of Federal Law which has not been but should be considered by this Court.

Statement of the Case.

A more complete statement of the facts than that contained in the petitioner's brief is required in order to determine whether there are sufficient grounds to sustain the petition now before the court.

Jeannette E. Barnett and Leon E. Stropp instituted suit in the New Jersey Supreme Court against the Aetna Life Insurance Company claiming the death benefits under a policy in the amount of $30,000 issued by that Company on the life of Robert James Barnett. The plaintiff-respondent, Jeannette E. Barnett, wife of the insured, was the named beneficiary. The beneficiary agreement attached to said policy made payable to Leon E. Stropp, creditor, an

amount as his interest may appear, the remainder to Jeannette E. Barnett (Exs. P-2, P-8A, Vol. II, offered R. 37a).

A similar suit was instituted by Jeannette E. Barnett against the Equitable Life Assurance Society of the United States in the New Jersey Supreme Court upon a policy issued by that Company in the face amount of $5,000 on the life of Robert J. Barnett. The plaintiff-respondent, Jeannette E. Barnett, the wife, was the sole beneficiary (Exs. P-1, P-1A, Vol. II, offered R. 36a). Both actions were removed to the Federal Court by the petitioner and were consolidated at the trial with the suit by the Savings Investment and Trust Company against the Aetna Life Insurance Company. In each of the complaints the respondent pleaded that the insured Barnett had absented himself from his last known residence in New Jersey for seven years successively and had not been heard from or of and is presumed dead by reason of the statute of New Jersey in such case made and provided (R. 4a and 27a).

It is inaccurate to assert, as do the petitioners on page 7 of their brief, that the respondents abandoned the claim of suicide. See also Proofs of Claim (Ex. P-6, p. 37a, Vol. II, offered R. 55a and P-8, p. 53a, offered R. 55a).

The facts produced at the trial were these:

Robert J. Barnett was born July 24, 1894 (R. 75a) and married Jeannette E. Barnett February 9, 1918 (R. 38a). Robert J. Barnett was a banker and had been in the banking business all his adult life (R. 41a, 42a).

At the time of his disappearance on December 28, 1932, he lived in the home which he and his wife owned at 143 Forrest Avenue, Glen Ridge, New Jersey. He was at that time President of the Discount Corporation, a company which he had formed (R. 61a). Previously, he had been successively Vice President and President of the East Orange Trust Company (R. 112a).

From the date of his marriage to the date of his disappearance he and his wife had lived together as a happy and devoted couple. He was a temperate man, never drank, was fastidious and meticulous in his dress and habits and was a regular attendant at church. His wife so testified (R. 43a, 53a to 55a). In this she was supported by the testimony of insured's mother, Mrs. Minnie A. Barnett, his brother, William V. Barnett, his brother-in-law, Harold H. Sherwood, Mrs. Barnett's sister, Annette Evelyn Wheeler, her brother-in-law, J. Watson Wheeler, the co-plaintiff, Leon E. Stropp, friend of the family and business associate of Barnett, Henry E. Freytag, Harry C. Griffith, Edward W. Simpson, other business associates and friends of Mr. and Mrs. Barnett and Mrs. Therese M. Davies, who boarded at the home of the Barnetts (R. 110a, 121a, 131a, 106a, 103a, 97a, 113a, 171a, 325a, 207a).

Only twice during his married life was he away from his wife, and then only over night on a business matter (R. 54a). He had the habit of notifying his wife if he was to be late for dinner (R. 42a).

With his wife he would visit his parents in Ridgefield Park and on alternate holidays and occasions would visit her parents and sister and brother-in-law in Kingston, New York. He and his wife would visit with Barnett's brother and with Barnett's sister and brother-in-law.

Prior to his disappearance, he had been involved in a litigation with the Savings Investment & Trust Company, which litigation terminated adversely to Barnett, the decision being rendered on December 15, 1932 (R. 42a). As a result of this suit, he and other friends and associates of his were required to stand a considerable financial loss which Barnett in the aforementioned suit had claimed was the responsibility of the Savings Investment & Trust Company and not his and that of various associates. The adverse

result of this litigation greatly upset Barnett and depressed him. His wife so testified (R. 92a). His friend and fellow director, a retail druggist, Henry E. Freytag, testified that during the trial of the suit against the Trust Company Barnett was extremely nervous and upset, that "his mind didn't function the way it normally did", that he was normally a man of keen mind and that he didn't seem to know that someone was talking to him when he was being addressed. Freytag also testified that he knew Barnett was taking nerve tonic and nerve sedatives, because he, Freytag, filled his prescriptions (R. 113a, 114a).

The litigation with the Savings Investment & Trust Company received much publicity in the newspapers, including pictures of Barnett (R. 64a, 65a). While this litigation was going on, he received a telegram from a Marie Jordan, whom the defendants, in their brief (p. 6) have characterized as a mild sort of blackmailer. The telegram asked him for money (Exs. D-1, D-15, pp. 71a, 103a, Vol. II, offered R. 233a, 485a). It was received while Mr. and Mrs. Barnett were at his mother's and was telephoned to him there by a Mrs. Davies, a boarder at Robert J. Barnett's home (R. 208a). Mr. and Mrs. Barnett reported the matter to the police (R. 65a). The supposed sender was unknown to him (R. 164a).

On December 24, 1932, Barnett and his wife visited her mother, sister and brother-in-law in Kingston, New York. They remained there until December 27, 1932 (R. 41a). During this visit, Barnett was continuously with either his wife or one or more of his in-laws. The sister-in-law (R. 107a) noticed his nervousness and restlessness. The Barnetts returned to their home in Glen Ridge for evening dinner on December 27, 1932. The following morning, December 28, 1932, Barnett left for his office at the Discount Corporation in East Orange, New Jersey. He gave no indication that he would not return in the evening. At

breakfast that morning, however, was the last time Mrs. Barnett saw her husband, Robert James Barnett (R. 41a, 42a).

When Barnett failed to return home for dinner in the evening at his usual time, Mrs. Barnett became anxious. She inquired of his business associate to learn if he had been detained. She also inquired at the Glen Ridge Police (R. 44a) seeking to learn if a mishap had occurred.

The following morning Mrs. Barnett received in the first mail at the house a letter in the handwriting of her husband, Robert James Barnett, in an envelope addressed by him and mailed from New York. (Exs. P-4 and 5, pp. 33a, 34a, Vol. II, offered R. 46a), which read as follows:

> "Dearest Jen:—
>
> "My heart is broken—my spirit is gone and I am almost crazy. I cannot go on.
>
> "For your sake, Dearest, while something is left —I must make the sacrifice—for you and your future. What have you to look forward to with me. You are too good, too wonderful, as you have been a wife and companion, to suffer longer. See H. C.—don't let the insurance lapse, see L. E. S. about this.
>
> "It is your salvation, there should be about $25,000—out of Stropp's balance pay H. C. 7500—Henry 4500 and Ed W. S. $2,500. Take care of Father's $1,500 ($500 old).
>
> "Forgive me and may God bless you and protect you as long as you live.
>
> "Bob."

Mrs. Barnett called her husband's family who came to the insured's home, as did the brother-in-law and other friends (R. 48a). Mrs. Barnett was prostrated with grief. The Glen Ridge Police were notified, and a five-state alarm was sent out (R. 153a). The East Orange Police, where

Barnett's office was located, started a search. Four or five days after the disappearance, the East Orange Police returned the insured's clothes, watch and jewelry with the exception of his socks and underclothing (R. 51a, 52a, 57a).

The brother, William V. Barnett, advertised in New York and Boston newspapers for his brother and offered a reward (R. 119a). The brother-in-law, Mr. Sherwood, and his lawyer, James W. Jackson, conducted an investigation (R. 132a). Jackson also advertised in the newspapers for Barnett (R. 192a, Ex. P-6, p. 41a, Vol. II, offered R. 55a). The brother-in-law and his attorney also interviewed the porter of the steamer Plymouth of the Fall River line on which Barnett's clothes were found (R. 133a, 180a).

Within a week or two after the disappearance, Sherwood and Jackson, having learned of the telegram aforementioned (Ex. D-15) called at the address mentioned in the telegram and inquired for Marie Jordan, who was therein mentioned. The occupants of the address, 71 Emmet Street, denied knowing Robert J. Barnett. Jackson and Sherwood left their cards (R. 133a, 140a, 183a). The next day as a result of a telephone call from Marie Jordan, Jackson and Sherwood met her in Newark. She told the story of having been "picked up" by Barnett on Broad Street in Newark around Decoration Day in 1932 (R. 185a). She claimed to have gone out with him. She promised to advise them if she heard from Barnett. Shortly thereafter she brought to attorney Jackson's office in New York a letter which she claimed was from Barnett (Ex. P-9, p. 66a, Vol. II, offered R. 187a). This letter purportedly requested Marie Jordan to meet Barnett at the Tube Station in New York on a certain date. She was asked by Jackson to produce the envelope. This she failed to do. She brought only a cancelled stamp. (Ex. P-10, p. 68a, Vol. II, offered R. 188a). Jackson, having compared the handwriting of

the letter with specimens of Barnett's handwriting, realized that they were totally different. Subsequently, when Marie Jordan was called as a witness by the defendant, she admitted that this letter was entirely false and was written by a friend of hers, Therese Wallace Costa (R. 286a-288a).

Mrs. Barnett continued to reside at the Glen Ridge home until May of 1932 (R. 49a). She then visited her mother for a year in Kingston, New York. She also stayed with her sister in Ohio for two months, and then went to Philadelphia with friends for a short time and to Ocean City, New Jersey for two weeks. She returned and sought work in New York (R. 58a, 59a). She obtained employment in New York and has been supporting herself ever since (R. 53a, 60a). After obtaining employment, Mrs. Barnett resided at the Marlborough Hotel (R. 60a), where she and Mr. Barnett had resided before making their home in Glen Ridge (R. 77a). Thereafter Mrs. Barnett continued to reside in East Orange in a boarding house (R. 60a). Mrs. Barnett never saw her husband again after the morning of December 28, 1932 and never heard from him again with the exception of the aforementioned letter. No member of his family or her family and none of his close friends or business associates ever saw or heard from him after December 28, 1932. The police, despite a five-state alarm and diligent search over years, never found any trace of Barnett.

No evidence was offered by the petitioners and no evidence was elicited by the defense on the cross-examination of any of the respondents' witnesses that would permit the possibility of an inference that the wife or the family or close business associates of Barnett had seen or heard from him, or that a thorough and diligent investigation had not been made. Not the slightest proof appears in the case that the wife, family and business associates of Robert J.

Barnett are anything but persons of the highest type, highly respected in their business and communities.

The petitioners produced Marie Jordan Fosselli. She testified that she had met Barnett in June of 1932 at Broad and South Streets in Newark (R. 229a, 230a), and that she saw him once or twice a week, until he disappeared, at the home of a friend at 97 Emmet Street, Newark, New Jersey (R. 231a). She admitted sending the telegram (Ex. D-1), and that she saw him once thereafter (R. 233a, 234a). She claims to have been given money by him and to have been with him on 13th Avenue, Newark (R. 236a). She admitted that the letter (Ex. P-9) which she had given to Jackson advising him that it was from Barnett, was absolutely false. She claimed to have talked over the telephone with Barnett in February of 1933 (R. 239a), although she had never spoken to him on the telephone before (R. 298a).

On cross-examination, she admitted that the contents of the telegram (Ex. D-1, p. 71a, Vol. II, offered, R. 233a) that she had sent to Barnett were absolutely false (R. 271a, 272a, 276a). She stated that in the supposed telephone call from Barnett in February of 1933, he had requested her to meet him at the Hudson Tubes in New York at 2 p. m. She and a number of policemen from New York and New Jersey went there on the appointed day and waited, but Barnett never showed up (R. 295a, 296a). It is interesting to note that the place and hour where she claimed Barnett had requested to meet her in the alleged telephone call, namely, Hudson Tube Station, and of which she had informed the police, was the same place and hour at which Barnett was to have met her a few weeks earlier according to the letter (Ex. P-9) which she had given to Mr. Jackson and which she admitted was false and pure fabrication. She never claimed to have heard from Barnett after February of 1933.

Francis X. Sullivan, New York Subway policeman and former doorman at the apartment house at 205 East 78th Street, New York City from 1930 to 1935, testified on direct examination, that about twice a week (R. 362a) during the summer of 1934, a man, giving his name as Robert Barnett, came to that building to see a tenant, Miss Rivers (R. 361a, 364a, 365a). Sullivan was first questioned about Barnett in 1940 by Mr. Provost, who was connected with The Equitable Life Assurance Society of the United States (R. 366a, 381a). Sullivan also claimed that some months after Barnett had ceased coming to the building, two New York detectives had interrogated "another man in the building, gave him a picture and when he saw it, he recognized the picture" (R. 367a). Sullivan identified the central figure in that picture (Ex. D-3, p. 73a, Vol. II, offered R. 360a) and the man in Exhibits D-4, D-5 and D-6 as being Robert J. Barnett.

On cross-examination, he admitted that he had studied to become a policeman in 1929 (R. 363a) and that it was Donlon, his brother-in-law, the Hall Captain of the apartment house, who had been questioned by the policemen in 1934 and 1935 and given a picture (R. 367a) with Barnett's name and police department case number on the back (R. 401a). He admitted that he and his brother-in-law examined and discussed the picture a great many times (R. 369a, 380a). He identified Miss Rivers as being in the neighborhood of 25 to 30 years old, "Blonde, slim built, fair complexion" (R. 397a). Significantly, his brother-in-law, Donlon, who worked in the same apartment house, testified that Miss Rivers was "kind of heavy, kind of plump" (R. 445a).

James Joseph Donlon, who contradicted his brother-in-law, Sullivan, as to the description of Alma Rivers, upon whom Barnett was supposed to have called, stated that he was first approached in the summer of 1934 by two New

York detectives and a police officer from the Sheriff's office in Essex County, New Jersey, who showed him a picture of Barnett and told him they had a warrant for him (R. 446a, 447a). He left a copy of the photograph with Donlon. Donlon claimed that in fall of 1934, Barnett called in a large car—Pierce Arrow coupe—(R. 449a, 456a) but Miss Rivers was not home; that he, Donlon, the Hall Captain, attempted to follow the alleged Barnett in a tenant's automobile.

On cross-examination, Donlon also admitted that he had been studying to become a policeman, and that the photograph given to him by the police in 1934 had a typewritten description of Barnett on the reverse side (R. 451a). He again contradicted his brother-in-law on cross-examination by stating that Barnett did not call on Miss Rivers in the summer of 1934, but only from March to June and once in October or November.

George R. Bradshaw, former superintendent of an apartment house at 33 East 22nd Street, New York City from 1937 to 1941, testified that Miss Ruth Baum was a tenant in the building in the summer of 1939; that she was visited 10 or 12 times by a man called Bob, who drove an automobile (R. 408a, 409a), and that he, Bradshaw, gave this man a little dog (cross between a poodle and a chow, R. 410a) which the so-called Bob had asked for and which the so-called Bob took away in his car, a greenish blue sports roadster with the top turned down (R. 412a).

Mrs. Barnett testified, however, that the insured didn't like dogs and objected to having one around the house (R. 510a, 511a). The brother, William Barnett, testified that he had never known his brother to own a dog. He had never even seen him stroke or pet a dog or show any affection for dogs (R. 517a).

Bradshaw identified the central figure in Ex. D 4 as being the man he had seen. On cross-examination he stated

that at the end of 1939 representatives of the police department showed him the photographs (Exs. D 4 and D 6, R. 413a). He testified that Miss Baum moved out in 1941 (R. 414a) and then later testified she moved out in 1939 (R. 423a, 426a). In 1940 he was shown a moving picture by two men whom he thought came from the insurance company (R. 418a, 419a). They also gave him a photograph like the one the police had given him and he always kept this in his desk. The man never came back after the police had interviewed the witness.

Albert H. Starke, superintendent of an apartment house at 299 West 12th Street, New York City, testified on direct examination that a man named Raymond Hatch was living there with one Alma Rivers in October of 1933 (R. 427a, 432a). He claimed to have seen a man with Hatch whom he identified from Exs. D 4 and D 6 on three occasions between September 25 and October 15, 1933 (R. 432a).

On cross-examination, he claimed that Miss Rivers was in the habit of inviting the witness to the apartment and confiding in him and that everybody in the building knew that Hatch was keeping this woman (R. 437a, 438a and 442a). He stated that the first time he saw this man was when he entered the building with Hatch and stood near while Hatch and the witness talked in the lobby (R. 435a). The second time he saw him was when the witness delivered a package to the Rivers' apartment and this man answered the door, and the third time, when he saw the man coming down the street with Mr. Hatch, and the witness met Hatch and started to talk and Hatch requested this gentleman to wait upstairs. He further admitted on cross-examination that in 1940 representatives of the insurance company (R. 441a) showed him Ex. D 3 (p. 73a, Vol. II, offered R. 360a). He admitted that there were about 300 people living in the apartment house in 1933 and that people

were coming and going all the time, and that he had worked in six other apartment houses in New York City (R. 442a).

James Cutsler, a part time bartender at the Blairstown Inn, in New Jersey, testified on direct examination that in November and December of 1940, he saw a person, who looked like the center figure in photograph Ex. D 3. He claimed to have seen this person five or six times at the bar where he served him an unusual brand of scotch—"Teachers" (R. 461a, 463a).

On cross-examination, he admitted that in June of 1941 two policemen came to the Inn, had a couple of beers, showed him a picture and asked him if he recognized the man. He advised them that he did (R. 477a). He further stated that immediately after being shown the picture and recognizing it, he was asked to sign an affidavit which had already been typewritten and merely required a signature and that these policemen discussed this alleged man and picture with him although he had never mentioned seeing this person either to the owner of the Inn or to anybody else (R. 480a).

In addition, the petitioners produced acting police Lieutenant Joseph E. McGinley, who testified that he made an investigation, certified the teletype messages sent out for him (R. 483a, 484a) and admitted that he had neither seen nor talked with Barnett since December 28, 1932. He admitted further that he knew him before that time (R. 488a, 489a).

The petitioners moved for a directed verdict (R. 518a, 524a) which the court denied. The case was submitted to the jury which returned verdicts in favor of all the respondents (R. 535a). Judgments were entered for the full amount of the policies together with interest from the date of the filing of the proofs.

The petitioners appealed from those judgments and they were affirmed by the Circuit Court of Appeals for the Third Circuit. Petitioners now make this application for a Writ of Certiorari.

Summary of Argument.

The respondents, Jeannette E. Barnett and Leon E. Stropp, respectfully submit that the petition for Writs of Certiorari should be denied because:

1. The Trial Court properly charged the jury with respect to the law of New Jersey applicable to the facts.

2. The Circuit Court of Appeals in holding that the Trial Court's exclusion of the inventory and account of receiver (Ex. D-9) was not harmful error has not decided an important question of Federal Law which has not been but should be considered by this Court.

I.

The Trial Court properly charged the jury with respect to the law of New Jersey applicable to the facts.

A. The respondents proved the necessary elements to invoke the statutory presumption of death. N. J. R. S. 3:42-1.

The statute of New Jersey, R. S. 3:42-1, upon which plaintiffs rely, provides as follows:

> "Article 1. Presumption of Death.
>
> "3:42-1. Death presumed after seven years' absence of resident or nonresident. If a resident or nonresident of this state remains beyond the sea, absents himself from this state or from the place of

> his last known residence, or conceals himself in this state or in the place of his last known residence, for seven years successively, *he shall, whenever his death comes into question, be presumed to be dead, unless it is proved he was alive within that time.*" (Italics ours.)

This statute clearly provides that where the actual death of an individual cannot be established by a death certificate or testimony of physician, the fact of such death may be established by proving that the individual absents himself from this state or from the place of his last known residence for seven years successively. In the case at bar, the respondents proved that from December 28, 1932, Robert J. Barnett had absented himself for over seven years successively from his last known residence in the state of New Jersey. With the exception of the letter received the following morning, he was not heard from or seen by his wife, relatives, friends or business associates thereafter. These facts were not denied, nor even disputed by the defendants. The statute, which has been part of the statutory law in almost identical language since 1797, has been construed to mean that the person seeking to invoke the statutory rule must in addition show that diligent inquiry has been made for the absentee in order to find him. In *Osborn* v. *Allen* (Sup. Ct., 1857), 26 N. J. L. 388, Chief Justice Green said:

> "* * * Evidence that the party was actually absenting himself from the state, or was concealing himself within the state, would necessarily prove that he was living, and would, consequently, rebut the very presumption that the statute was designed to create. All the proof that can be required or expected is, that the party has been absent from the state, or from his family or home, and has not been heard from within the period prescribed by the statute. * * *"

To the same effect is *Armstrong* v. *Armstrong* (Ch., 1926), 99 N. J. Eq. 19, 132 Atl. 237, affirmed on opinion below, 102 N. J. Eq. 330, 140 Atl. 918, and *Burkhardt* v. *Burkhardt* (Ch., 1902), 63 N. J. Eq. 479, 52 Atl. 296.

The respondents fully and completely met the requirements of the statute as construed by the courts of New Jersey. There was neither direct testimony nor any evidence from which an inference could be drawn which contradicted the evidence of the respondents that Barnett had disappeared from his home in New Jersey for over seven years, and despite diligent search and inquiry by his wife and relations and the police, had not been seen or heard from by his wife, relations, business associates and friends. He was a man devoted to his wife and to his own parents, and they to him, and who, by his last letter, showed that he was thinking of them and of all his close friends and business associates. Under those circumstances, it is respectfully submitted that the plaintiffs had clearly and indisputably proved the necessary elements to invoke the statutory presumption of death.

B. Under the New Jersey statute, the presumption of death can be overcome only by proof that the absent person is in fact alive.

The language of the statutory provision as to the presumption of death is clear and definite. Once the basic elements are established the presumption of death arises, and where those basic elements are not disputed or attacked, as in the case at bar, the presumption may be overcome only as the statute provides and the statute says he is "presumed to be dead *unless it is proved that he was alive within that time.*" (Italics ours.) As early as 1846, Chancellor Halstead said in the case of *Smith* v. *Ex'rs of Smith* (Ch., 1846) 5 N. J. Eq. 484, at 485,

> "The words of the statute and the reason of the thing require that, unless proof be made that the person absenting himself has been heard from, the presumption of his death arises at the expiration of seven successive years of absence. The party seeking to avoid this presumption, or, rather, to prevent its arising, can do it only by showing that the absent person was alive within the seven years. * * *"

The presumption of the death of Robert J. Barnett and the effect of that presumption could not be avoided by the petitioners unless they proved as a matter of fact that Barnett was alive subsequent to his disappearance.

C. Under the statute, the petitioners were the proponents of the issue that Barnett was in fact alive.

The trial court charged the jury as follows:

> "The burden is upon the plaintiffs to prove by a fair preponderance of the evidence the facts essential to the right of recovery. That is true in every case. These facts in this case, simply stated, are:
>
> "First, the issuance and subsistence of a policy of insurance; which fact is here admitted; second, the payment of premiums due thereunder; which fact is likewise here admitted; and, third, the death of the insured; which fact is denied."

After quoting the statute to the jury, the court said:

> "You are instructed that under the provisions of the statute the burden is upon the plaintiffs in the first instance to prove not actual death but absence of the insured from either the state or his place of residence for a period of seven years, seven successive years next preceding the filing of the proof of death with the defendant. This date is fixed as of February 27, 1940. Upon adequate proof of these facts, which in law are recognized as sufficient to

support a presumption of death, the insured is presumed to be dead unless it is proved by the party who disputes the presumption that the insured was, in fact, alive within the seven years next preceding the filing of the proof of death. * * *"

"Here the presumption of death is disputed by the defendants, who allege that the insured was, in fact, alive within the seven years next preceding the filing of the proof of death. You are instructed that under the statute the burden is upon the defendants to prove by a fair preponderance of the evidence that the insured was, in fact, alive within the period. This fact may be proved by either direct evidence or circumstantial evidence. Adequate proof of facts and circumstances inconsistent with the presumption of death, from which it may be inferred that the insured was, in fact, alive within the period, will overcome the presumption of death. However, you are cautioned that proof of facts and circumstances which create in your minds a mere suspicion that the insured was alive within the period will not overcome the presumption of death. The presumption of death is conclusive, as a matter of law, in the absence of proof that the insured was, in fact, alive. Therefore, if you find that the insured was, as contended by the defendants, in fact alive within the seven years next preceding the filing of the proof of death, the verdict shall be in favor of the defendants and against the plaintiffs" (R. 526a, 527a, 528a).

The court further charged the petitioner's 12th and 13th requests to charge (R. 532a) in which the jury was told that if they conclude Robert J. Barnett was alive at any time within the seven years prior to February 27, 1940, or after February 27, 1933, then the respondents cannot recover, and further charged them, as requested, that if the jury believed the testimony of one or more of the witnesses of the petitioners and was satisfied that one or more of those

witnesses did see or hear from Robert J. Barnett after February 27, 1933, the verdict must be for the defendant.

The petitioners contend that the Trial Court committed error in its charge on the burden of proof. As the Circuit Court so soundly pointed out, the petitioners seek to sustain this contention by isolating two sentences from the charge. However, considering the whole charge of the Trial Court it is clear that it properly charged the law applicable to the facts.

The petitioners now also contend that there is but one issue, namely; is the insured dead?; and that, therefore, the Trial Court's charge was erroneous. In this argument the petitioners disregard the express language of the statute. It is respectfully submitted that the Trial Court, in conformity with the provisions of the statute, properly and correctly advised the jury that the respondents had the burden of establishing the basic elements that give rise to the statutory presumption of death. It then advised them that this presumption must prevail, unless it is proved that the insured, Barnett, was, in fact, alive. The petitioners, under the wording of the New Jersey statute and the cases decided thereunder, were the proponents of the proposition that Barnett was in fact alive.

In *Hoyt* v. *Newbold* (Sup. Ct. 1883), 45 N. J. L. 219, the learned court said:

> "The plaintiff insists that the burden of proof is on the defendant to show that Abraham Tuers, Jr., was dead when the deeds to plaintiff were given. The language of the statute will not admit such construction. The presumption of death after continued absence of over seven years successively, *must be overcome by proof* that the person was living. (Italics Court's.)
>
> "In 2 Greenl. on Ev., §278, the writer uses the following language, viz.: '* * *. But however this

> may be as a mere presumption of law, the rule is now settled for most judicial purposes that the presumption of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time they were last known to be living, after which *the burthen of proof is devolved on the party asserting the life of the individual in question.*'" (Italics ours.)

The *Hoyt* case was approved and followed by the Court of Errors and Appeals in *Meckert* v. *Prudential Ins. Co.*, 114 N. J. L. 320, 176 Atl. 587.

An analogous situation arises under the New Jersey statute providing that certain proof shall be *prima facie* evidence of the violation of the statute relative to spark arresters on railroad engines (now N. J. R. S. 48:12-86). Under that statute the Court of Errors and Appeals in *Goodman* v. *Lehigh Valley R. R. Co.*, 78 N. J. L. 317, 74 Atl. 519, said:

> "* * * The court rejected the latter contention on the ground that to accept it would render the section utterly futile, and held that the legislative design was to declare that when fire was communicated to property by any locomotive engine, that fact should be *prima facie* evidence that all practicable means had not been employed by the company to prevent the communication of fire, and so placed upon the company the burden of proving the exercise of due care.
>
> "With this construction we agree."

The cases under the New Jersey negotiable instrument law are a further illustration of the effect of statutory provisions with respect to the question of who has the burden of proof. In *Crown Capital Corp.* v. *Broderick* (Sup. Ct. 1943), 130 N. J. L. 198, 32 Atl. 2d 289, a suit had been

brought upon a promissory note. In reversing a judgment for the defendant, the court said at page 199:

> "* * * When the plaintiff produced the note in evidence it made out a *prima facie* case. It was not necessary to establish the amount due on the note for the burden of proof of payment rests with the defendant. *Trustees System Company of Newark* v. *Lisena*, 106 N. J. L. 549; 150 Atl. Rep. 373. * * *"

In *Trustees System Co.* v. *Lisena* (Ct. of E. & A., 1930) 106 N. J. L. 549, 150 Atl. 373, cited in the *Crown Capital Corp.* case, it was held that the debtor under an outstanding promissory note had the burden of proof that payment had been made.

In *Fidelity Union, &c. Co.* v. *Decker, &c., Co.* (Ct. of E. & A., 1930), 106 N. J. L. 132, 148 Atl. 717, suit was instituted to recover the amount due on a promissory note. The Court said, 106 N. J. L., at 135 and 136:

> "The burden was upon the appellants to establish, in order to escape liability, that the plaintiff-respondent had knowledge of the infirmity in the note in question at the time it was discounted, and further, that the proceeds of the said note had not been checked out by the bank. * * *; and as the legal presumption is, that the holder of a negotiable instrument, transferred to him, before maturity, is a *bona fide* holder for value, the burden rests upon the defendant to establish otherwise."

The cases to which the petitioners refer, such as *Kresse* v. *Metropolitan Life Ins. Co.* (E. & A., 1933), 111 N. J. L. 474, 168 Atl. 634 and *Schlosser* v. *Goldberg* (Sup. Ct., 1939), 123 N. J. L. 470, are not in point. In the *Kresse* case, the court held that the plaintiff seeking recovery under an accident policy which had a provision against recovery for death

by suicide, had the burden of proving that the death was accidental within the meaning of the policy. The plaintiff was the proponent of the issue that the death was accidental, and the judicial presumption against suicide did not shift the burden.

In the *Schlosser* case an action for personal injuries resulting from drinking carbonated water sold by the defendant and allegedly containing foreign matter, the court properly held that a request to charge, which amounted to a request that the defendant has the burden of proving its freedom from negligence was obviously a bad charge.

It is respectfully submitted, therefore, that a reading of the entire charge of the Trial Court will show that the case was submitted to the jury in accordance with the law of New Jersey as expressed in the statute and in the cases. The Trial Judge properly instructed the jury what the respondents were required to prove under the presumption of death statute.

The petitioners, at the trial, attempted to show by witnesses that Barnett was alive during the statutory period. The Trial Court plainly instructed the jury that they must be satisfied that the respondents had established by the preponderance of the evidence the basic elements necessary to invoke the declaration of death under the statute. The Trial Court equally correctly told the jury that the petitioners having asserted, as they must under the statute, that this man is, in fact, alive must prove that issue. The charge was fair and complete and nothing could have been more favorable to the petitioners than the court's charging their 13th and 14th requests to charge, in which the jury was told in the closing moments of the charge that if they believed the testimony of one or more of the petitioners' witnesses and are satisfied that one or more of those witnesses did see or

hear from Robert James Barnett after February 27, 1933, then the verdict must be in favor of the petitioners (R. 532a and 533a).

II.

The Circuit Court of Appeals in holding that the Trial Court's exclusion of the inventory and account of receiver (Ex. D-9) was not harmful error has not decided an important question of Federal law which has not been but should be considered by this Court.

The petitioners offered in evidence a copy of the inventory and account (Ex. D-9, p. 86, Vol. II, offered R. 344a) of the receiver appointed in the suit between Edward W. Simpson and the Discount Corporation. The correctness of the Trial Court's ruling appears from the colloquy between counsel and the court which occurred at the trial (R. 344a). The inventory was offered for the purpose of showing that the Discount Corporation was insolvent at the time Barnett disappeared. This fact was proved by the decree of the Court of Chancery of New Jersey declaring the Corporation insolvent, which was in evidence (Ex. D-10, not printed in record, offered R. 347a). The inventory itself contained conclusions of an auditor and appraisers who, of course, were not available for cross-examination.

In making the argument that the inventory and account (Ex. D-9) was admissible and that the Circuit Court of Appeals' affirmance of the District Court's rejection resulted in a decision of an important question of Federal law which has not been but should be decided by this court, the petitioners fall into serious error. The petitioners in this suit and in their brief have attempted to create the

impression that the respondents were relying for recovery upon the theory that the insured was a suicide. This is not the fact, as the pleadings, proof of claim and the colloquy between court and counsel (R. 321a) show. They further seek to substantiate their contention by asserting that Ex. D-9 was material as to the motives for the disappearance of the insured. As was pointed out by the New Jersey Court of Errors and Appeals in *Meckert* v. *The Prudential Ins. Co.* (Ct. of E. & A., 1934), 114 N. J. L. 320, 176 Atl. 587:

> "Irrespective of the decisions by the courts of this state, counsel for appellant argues that the fact that the insured was a fugitive from justice overcomes the presumption of death to which the above-mentioned statute refers. The fact that the insured was wanted for forgery or other crimes may have been a motive for disappearing but such reason would not be sufficient for remaining away for a period of over seven years and, therefore, such fact would not overcome the presumption of death as a matter of law. * * *"

The case of *Equitable Life Assurance Society* v. *Sieg* (C. C. A. 6th 1931), 53 F. 2d 318, cited by the plaintiffs, is not in point. The statute in question in the *Sieg* case uses the express words "unexplained absence." Those words are not part of the New Jersey statute.

The petitioners also contend that the inventory and account was competent evidence under 28 U. S. C. 695. Of course, if the evidence is not material to the issue in the case, as the respondents respectfully submit, the provisions of that statute are of no avail to the petitioner.

The cases which the petitioners have cited do not support their contention. In *United States* v. *Mortimer* (C. C. A. 2d, 1941), 118 F. 2d, 266, Cert. Den. 314 U. S. 616, the

document or record involved was a chart prepared by one of the witnesses assisted by several aides. This witness actually took the stand. As a matter of fact the reliability of the charts was not questioned and a number of the defendants and their witnesses had found no disparity in the charts.

As was pointed out in *Palmer* v. *Hoffman* (1943), 318 U. S. 109 and in *Ulm* v. *Moore-McCormack Lines* (C. C. A. 2d 1940), 115 F. 2d 492, rehearing denied 1941, 117 F. 2d 222, Cert. Den. 313 U. S. 567, the purpose of 28 U. S. C. 695 was to make admissible in evidence the records made "in regular course" of business without requiring the individual testimony of each person involved in making such record. In *Palmer* v. *Hoffman* the statement of the engineer of a train involved in an accident, which had been given in an interview with an assistant superintendent of the railroad, was considered not to be made "in the regular course" of business within the meaning of the Act. As Mr. Justice Douglas said:

> "* * * The result would be that the Act would cover any system of recording events or occurrences provided it was 'regular' and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a 'business' or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. * * * If the Act is to be extended to apply not only to a 'regular course' of a business but also to any 'regular course' of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide

> the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met."

In the case at bar the petitioners were attempting to submit in evidence the reports and conclusions of auditor and appraisers which had been furnished to the receiver in another suit. In other words, it was not the records of the Discount Corporation as such, but a report, conclusions and opinions as to such records. This, it is respectfully submitted, was not what was contemplated by 28 U. S. C. 695.

As a matter of fact the Circuit Court of Appeals did not render an opinion upon the applicability of said Act. It is apparent from what has been hereinbefore stated that such a decision was unnecessary. The Circuit Court of Appeals in accordance with the recognized Federal rule determined that where the fact has been established by other evidence, its exclusion is harmless error. *Northern Pac. R. Co.* v. *Mortenson* (C. C. A. 8th 1894), 63 F. 530, error dismissed 166 U. S. 997. *Drumm-Flato Commercial Co.* v. *Edmission*, 208 U. S. 543.

As has been pointed out, the financial difficulties and the seriousness of them was fully before the jury. The insolvency of the Discount Corporation was proved by Ex. D-10. Even the insured's last letter to his wife (Ex. P-4) showed his financial difficulties. It is respectfully submitted that the Trial Court's exclusion of the documentary evidence in question did not constitute harmful error.

Conclusion.

For the reasons hereinbefore set forth, it is respectfully submitted that this Court should deny the petition for Writs of Certiorari.

Respectfully submitted,

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On the Brief:
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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 641.
AETNA LIFE INSURANCE COMPANY,
Petitioner,
vs.
JEANNETTE E. BARNETT AND LEON E. STROPP.

No. 642.
AETNA LIFE INSURANCE COMPANY,
Petitioner,
vs.
SAVINGS INVESTMENT & TRUST COMPANY.

No. 643.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner,
vs.
JEANNETTE E. BARNETT.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT, SAVINGS INVESTMENT & TRUST COMPANY IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT, SAVINGS INVESTMENT & TRUST COMPANY IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 139 F. (2) (Adv. Op.) 483 and

is printed in the record (R. 559-565).* No opinion was filed by the District Court of the United States for the District of New Jersey.

Statement of Jurisdiction.

The Judgments of the Circuit Court of Appeals were entered on December 9, 1943 (R. 565-567). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Sec. 347(a)).

The grounds alleged in the petition to sustain the present application are (Pet. p. 6):

1. The Circuit Court of Appeals, in affirming the District Court's instructions to the jury has decided an important question of local law, in a way probably in conflict with applicable local decisions, and

2. The Circuit Court of Appeals, in affirming the District Court's rejection of an inventory and account of receiver (Ex. D-9, p. 86a, Vol. II; offered R. 347a), has decided an important question of federal law which has not been, but should be considered by this Court.

Statement of the Case.

To determine whether or not there is any basis for the present application a fuller statement than is contained in petitioners' brief is deemed necessary.

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* Page references are to Volume I of the record unless otherwise noted.

Three suits to recover the proceeds of three policies of insurance upon the life of one Robert J. Barnett, presenting the same questions of law and fact, were consolidated for trial. Respondents rested their cause of action on the New Jersey presumption of death statute (N. J. R. S. 3:42-1) which reads:

> "If a resident or nonresident of this state remains beyond the sea, absents himself from this state or from the place of his last known residence, or conceals himself in this state or in the place of his last known residence, for seven years successively, he shall, whenever his death comes into question, be presumed to be dead, *unless it is proved he was alive within that time.*"*

Respondents proved that following the disappearance of Robert J. Barnett from his home on December 28, 1932, the Glen Ridge police were notified (R. 152a) and a five-state alarm sent out (R. 153a, Ex. D-13, R. 101a, Vol. II; offered R. 483a).

In response thereto, the police received information from Fall River, Mass., that when the steamship "Plymouth" arrived at that port, a man was discovered missing and clothing found on the boat answering description of insured's (R. 153a). A few days later, the East Orange police brought back to Mrs. Barnett from the boat her husband's personal belongings (R. 50a, 52a).

The following persons testified that they had not seen or heard from insured since December 28, 1932:

> Jeannette E. Barnett, insured's wife (except for letter received December 29, 1932, Pet. p. 6) (R. 39a).

* Italics supplied unless otherwise noted.

Mrs. Minnie A. Barnett, his widowed mother (R. 110a).

Mr. William V. Barnett, his brother (R. 120a).

Leon E. Stropp, co-respondent with Mrs. Barnett in No. 641, a member of the firm of Kuhn, Loeb and Company, and a friend and business associate of insured (R. 97a).

J. Watson Wheeler, brother-in-law (R. 103a).

Mrs. Annetta E. Wheeler, sister-in-law (R. 106a).

Henry E. Freytag, East Orange businessman, friend and business associate of insured (R. 113a).

Harold H. Sherwood, President of Sherwood Refining Company, brother-in-law of insured (R. 132a).

Harry C. Griffith, New York advertising man, a friend and business associate of insured (R. 171a).

Edward W. Simpson, East Orange businessman, friend and business associate of insured (R. 330a).

Police Chief Higgins of Glen Ridge (R. 158a).

Detective Sergeant McGinley of the East Orange Police (R. 488a).

Police Chief Higgins testified at length with respect to the efforts made by the police to locate the insured, including the five-state alarm (R. 153a), all which brought no results (R. 158a), other than the information from Fall River, (*supra*, p. 3).

In addition, insured's brother and brother-in-law testified at length with respect to the efforts made by them to locate the insured, including advertisements in the New York and Boston papers (R. 119a, 120a, 121a, 132a).

Petitioners did not controvert the testimony offered by respondents but introduced testimony in an endeavor to show that Barnett had been seen alive within the seven-year period, and introduced some testimony of the financial difficulties of the insured at the time of his disappearance.

Petitioners state that they "proved by witness Cutsler that insured is not dead and was seen alive as late as November or December 1940" (Pet. p. 3), and that several witnesses saw or heard from him since December 28, 1932. They fail to point out, however, that the testimony of these witnesses was of such doubtful quality and character that no reliance whatsoever could be placed thereon. For example, petitioners' witness Cutsler, a bartender in the Blairstown Inn, testified that in November or December 1940, a man whom he identified from a photograph to be Barnett visited his bar five or six times (R. 463a). In June 1941, he testified two police officers whom he had never seen before visited him at his bar and, without preliminary conversation, showed him a picture and asked if he recognized the man. He told them he did, and forthwith signed a typewritten affidavit, which they had prepared before they ever met him and which on that one occasion they submitted to him for execution (R. 477a, 479a-481a).

Another example of the dubious testimony offered by petitioners is that of Marie Jordan Fosselli, whom petitioners assert "spoke with him on the telephone in February 1933" (Pet. p. 3), and who is claimed to have sent insured a telegram requesting money (Pet. p. 5). The facts are however, that this witness, contrary to her direct testimony, testified on cross examination, and again in answer to the Court's question, that she had never spoken to Bar-

nett over the telephone before the alleged telephone call of February 1933 (R. 298a). She admitted that the telegram (Ex. D-1, R. 71a, Vol. II; offered R. 233a) was false. Her entire direct testimony was amply demonstrated to be unworthy of belief. The testimony of the other witnesses produced by the petitioners was of the same unreliable nature. The jury returned verdicts in favor of respondents. The Circuit Court of Appeals succinctly summarizes the testimony of petitioners' witnesses as follows:

> "Two of the six defense witnesses (Bradshaw and Cutsler) were contradicted, in part, affirmatively in the plaintiffs' case. The believeableness of the others was seriously impaired by cross examination. Only one of them, Mrs. Jordan Fosselli, claimed to have known Barnett prior to his disappearance. That lady was patently discredited. The others, indicated the slightest of casual relationships with the person asserted to have been the assured. Of them, Messrs. Sullivan and Donlan, brothers-in-law, claimed to have seen Barnett in 1934 and identified him from the photograph shown them in 1940. They contradicted each other as to time; as to the description of the woman on whom Barnett is supposed to have called; and the circumstances of their intensive application to the matter in 1940 does not help the acceptance of their stories. A superintendent of an apartment house containing 300 people identified a picture of Barnett shown him in 1940 on the basis of his assertion that he saw the assured three times in 1933. The only other defense witness was a person connected with the boat on which the assured was last seen."

Petitioners assert in their Statement of the Matter Involved (Pet. p. 7) that respondents abandoned any claim

they had made to suicide. Neither the proofs submitted to petitioners or the complaints in these suits (R. 4a, 17a, 27a) asserted death by suicide. Throughout this litigation petitioners have attempted to create the impression or have labored under the misconception that respondents were relying on death by suicide (see colloquy between court and counsel, R. 321a). The Trial Court pointed out to the jury in his charge that evidence of suicide was merely a factor for their consideration (R. 528a).

At the conclusion of the case petitioners moved for a directed verdict (R. 518a; 524a) which was denied. The case was submitted to the jury which returned verdicts in favor of respondents (R. 535a). Judgments were entered for the full amount of the policies, together with interest from date of filing of proofs.

These judgments were appealed to the Circuit Court of Appeals for the Third Circuit, petitioners contending that:

1. The Trial Court erred in denying petitioners' motion for a directed verdict.

2. The Trial Court erred in its charge to the jury.

3. The Trial Court erred in excluding proof of the practice on the steamer "Plymouth" with respect to the collection of tickets on disembarkation.

4. The Trial Court erred in excluding petitioners' testimony with respect to the defalcation and financial troubles of insured Barnett (which proferred testimony included an inventory and account of receiver (Ex. D-9)), and with respect to the criminal complaint and indictment found against him.

The Trial Court's rulings and its charge to the jury were in all respects affirmed by the Circuit Court of Appeals for the Third Circuit.

Except in respect to the Trial Court's charge to the jury and the ruling on the admissibility of the inventory and account of receiver (Ex. D-9), petitioners acquiesce in the disposition made of their contentions by the Circuit Court of Appeals (Pet. Br. p. 11). The petitioners now urge these two exceptions as reasons why writs of certiorari should issue to the Circuit Court of Appeals for the Third Circuit.

Summary of Argument.

Respondent Savings Investment & Trust Company, submits that the petition for writs of certiorari should be denied because:

1. The Trial Court's charge to the jury, affirmed by the Circuit Court of Appeals, was in all respects proper and in accordance with the applicable law of New Jersey.

2. The Circuit Court of Appeals, in correctly affirming the Trial Court's ruling with respect to the inadmissibility of the inventory and account of receiver (Ex. D-9) has not decided an important question of federal law which has not been, but should be considered by this Court.

I.

The Trial Court's charge to the jury, affirmed by the Circuit Court of Appeals, was in all respects proper and in accordance with the applicable law of New Jersey.

(a) Plaintiff-respondent established the conditions set forth in New Jersey Revised Statutes 3:42-1, and Robert J. Barnett is therefore presumed to be dead.

The Revised Statutes of New Jersey (R. S. 3:42-1) provide that a resident or non-resident of this state shall be presumed to be dead whenever his death comes into question if he "remains beyond the sea, absents himself from this state or from the place of his last known residence, or conceals himself in this state or in the place of his last known residence, for seven years successively". The presumption is overcome only if it is proved that he was alive within that time.

To bring a case within the statute, all that need be proved are facts showing that the insured has absented himself from the place of his last known residence for a period of seven successive years, and has not been heard from during that period, *Osborn* v. *Allen*, 26 N. J. L. 388 (Sup. Ct. 1857), and that due inquiry has been made to ascertain whether he is alive, *Armstrong* v. *Armstrong*, 99 N. J. E. 19 (Ch. 1926). In *Osborn* v. *Allen, supra*, Chief Justice Green said (26 N. J. L. 390):

> "All the proof that can be required or expected is, that the party has been absent from the state, or from his family or home, and has not been heard from within the period prescribed by the statute."

Respondents offered uncontroverted testimony that Barnett disappeared and absented himself from the place of his last known residence (Glen Ridge, New Jersey) for seven successive years, and proved that efforts of the police and members of the family to locate him were without success, and that he had not been seen or heard from since December, 1932, by the police, the members of his family, friends or close business associates (See Statement of Case, *Supra*, pp. 3-4).

In view of this proof submitted by respondents, which was not contradicted or disputed by petitioners, there can be no doubt that the conditions of the statute above set forth were fully satisfied and that the jury properly determined that respondents established the elements essential to recovery. Therefore, Robert J. Barnett is presumed to be dead, unless it was established as a matter of fact that he was alive within the statutory period.

(b) By the express language of the New Jersey Statute (R. S. 3:42-1), this presumption may be overcome only by establishing the fact that Robert J. Barnett was alive within the period set forth in the Statute.

When the conditions set forth have been satisfied the statute (R. S. 3:42-1) provides that whenever the death of such absent person comes into question, he shall be presumed to be dead "*unless it is proved he was alive within that time.*" The statute, in its own unequivocal language, provides under what circumstance the presumption is overcome. That circumstance is the establishment as a matter of fact that Barnett was alive within the seven-year period. In *Smith* v. *Ex'rs of Smith,* 5 N. J. E. 484 (Ch. 1846) Chancellor Halstead said (5 N. J. E. 485):

> "The statute provides that any person who shall absent himself or herself from the state for seven years successively, shall be presumed to be dead, unless proof be made that he or she was alive within that time. The bill states that Jasper B. Smith left the state in 1829, and that he has never been heard from since. The answer admits his absence from the state since 1829, but says he has been heard from. * * *
>
> The words of the statute and the reason of the thing require that, unless proof be made that the person absenting himself has been heard from, the presumption of his death arises at the expiration of seven successive years of absence. The party seeking to avoid this presumption, or rather, to prevent its arising, can do it only by *showing that the absent person was alive within the seven years.*"

Robert J. Barnett is, therefore, presumed to be dead, and this presumption is binding upon petitioners unless they have established as a matter of fact that *he was alive* within the statutory period.

(c) The party seeking to avoid the presumption of death must establish the fact that Robert J. Barnett was alive within the statutory period.

After quoting the New Jersey presumption of death statute, the Trial Court charged the jury (R. 527a, 529a):

> "You are instructed that under the provisions of the statute the burden is upon the plaintiffs in the first instance to prove not actual death but absence of the insured from either the state or his place of residence for a period of seven years, seven successive years next preceding the filing of the

proof of death with the defendant. This date is fixed as of February 27, 1940. Upon adequate proof of these facts, which in law are recognized as sufficient to support a presumption of death, the insured is presumed to be dead unless it is proved by the party who disputes the presumption that the insured was, in fact, alive within the seven years next preceding the filing of the proof of death. Therefore in the instant case if you find that the insured was absent from the state or from his residence for a period of seven years next preceding the filing of the proof of death, and is therefore presumed to be dead, your verdict shall be in favor of the plaintiffs and against the defendants, unless, of course, you find that the insured was, in fact, alive at any time during the period.

"Here the presumption of death is disputed by the defendants, who allege that the insured was, in fact, alive within the seven years next preceding the filing of the proof of death. [You are instructed that under the statute the burden is upon the defendants to prove by a fair preponderance of the evidence that the insured was, in fact, alive within the period.]

* * * * * *

"* * * as I stated to you, in the first instance, the burden is on the plaintiffs to establish the elements essential to recovery by a fair preponderance of evidence, and [I have instructed you that the burden is on the defendants to establish by a fair preponderance of evidence that the insured was, in fact, alive] * * *."

It is submitted that this is a correct statement of the law relative to the burden of proof in a suit instituted under

the presumption of death statute and that the Circuit Court of Appeals properly found (R. 563):

> "The appellants' next point is that the court erred in its charge with respect to burden of proof. They attempt to isolate two sentences from the charge in support of this. A reading of the entire charge shows the trial court to have fairly presented this phase of the matter to the jury."

The same two sentences that petitioners have again attempted to isolate on this application (Pet. Br. p. 12) are indicated by the brackets inserted in the above quoted portion of the Trial Court's charge (*supra*, p. 12).

The burden, of course, is on the respondents to establish the elements giving rise to the statutory presumption of death. In other words "the plaintiff has the burden of proving his case * * *" (Mr. Chief Justice Brogan in *Schlosser* v. *Goldberg*, 123 N. J. L. 470, 473 (Sup. 1939), (Pet. Br. p. 14). Respondents did establish the elements entitling them to recovery (Point I(a), *supra*).

But, respondents do not, as petitioners erroneously contend (Pet. p. 8; Pet. Br. p. 10), bear the burden of sustaining the affirmative of the question whether or not the insured is dead. Petitioners' entire attack upon the Trial Court's instructions to the jury is based upon this false premise, which is not the issue in this case.

All three suits consolidated herein were instituted under the presumption of death statute (R. S. 3:42-1). (See Complaints, R. 4a, 17a, 27a). The provisions of this statute are clear. Respondents must establish the essential elements set forth therein. When they have done this, the statutory

presumption arises, and is overcome only by establishing the fact that the insured was alive within the statutory period. The Trial Court correctly charged the jury that the burden was on respondents to establish the elements giving rise to the presumption, and correctly charged that the burden was on petitioners to establish that the insured was, in fact, alive within the statutory period.

The cases arising under this statute and considering this particular point have sustained the clear language of the statute. In the words of Chancellor Halsted:

> "The words of the statute and the reason of the thing require that, unless proof be made that the person absenting himself has been heard from the presumption of his death arises at the expiration of seven successive years of absence. The party seeking to avoid this presumption, or, rather, to prevent its arising, can do it only by showing that the absent person was alive within the seven years." (*Smith* v. *Ex'rs. of Smith,* 5 N. J. E. 484, 485, *supra,* p. 11).

And in *Hoyt* v. *Newbold,* 45 N. J. L. 219 (Sup. Ct. 1883), Mr. Justice Joel Parker said (45 N. J. L. 222):

> "The plaintiff insists that the burthen of proof is on the defendant to show that Abraham Tuers, Jr., was dead when the deeds to plaintiff were given. The language of the statute will not admit such construction. The presumption of death after continued absence of over seven years successively, *must be overcome by proof** that the person was living."

And, quoting from 2 *Greenl. on Ev.,* sec. 278, the court continued (45 N. J. L. 222):

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* Emphasis by the Court.

> "* * * the rule is now settled for most judicial purposes that the presumption of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time they were last known to the living, after which the burthen of proof is devolved on the party asserting the life of the individual in question."

The above cases were recently cited and quoted by the New Jersey Court of Errors and Appeals in *Meckert* v. *Prudential Ins. Co.*, 114 N. J. L. 320 (E. & A. 1935).

A similar result was reached by the Court of Errors and Appeals in *Goodman* v. *Lehigh Valley R. R. Co.*, 78 N. J. L. 317 (E. & A. 1909). In this case the court considered the effect of the statute providing certain proof shall be *prima facie* evidence of violation of the statutory provisions relative to spark arresters on railroad engines (now incorporated in R. S. 48:12-86). The court said (78 N. J. L. 321):

> "Somewhat similar provisions were contained in sections 13 to 17 of the General Railroad Act of 1874. *Gen. Stat.* pages 2670, 2671. In *Wiley* v. *West Jersey Railroad Co.* (1882), 15 *Vroom* 247, 250, the Supreme Court was called upon to construe the sixteenth section, which declared 'that in every action for the recovery of damages for an injury done to the property of any person or corporation by fire communicated by a locomotive engine of any person or railroad corporation in violation of the preceding sections of this act, proof that the injury was so done shall be *prima facie* evidence of such violation, subject, nevertheless, to be rebutted by evidence of the taking and using all practicable means to prevent such communication of fire as by said section required.' In that case the plaintiff claimed that by

> evidence tending to show that the fire was communicated by an engine of the defendant company, the burden of proof was cast upon the defendant. The latter, on the other hand, denied that the law became applicable until the plaintiff should further show that the fire was communicated in violation of the preceding sections of the act, that is, for want of the use of screens or some other practicable means. The court rejected the latter contention on the ground that to accept it would render the section utterly futile, and held that the legislative design was to declare that when fire was communicated to property by any locomotive engine, that fact should be *prima facie* evidence that all practicable means had not been employed by the company to prevent the communication of fire, *and so placed upon the company the burden of proving the exercise of due care.*
>
> "With this construction we agree."

Cases arising under the New Jersey Negotiable Instruments Law further illustrate the effect statutory provisions have upon the question of who bears the burden of proof in certain situations. In *Crown Capital Corp.* v. *Broderick,* 130 N. J. L. 198 (Sup. 1943) the New Jersey Supreme Court reviewed an action brought in the District Court of Middlesex County, on a promissory note, wherein the issue was whether or not the note had been paid. In reversing judgment entered for defendant, the Court said (130 N. J. L. 199, 200):

> "When the plaintiff produced the note in evidence it was made out a *prima facie* case. It was not necessary to establish the amount due on the note for the burden of proof of payment rests with the defendant. *Trustees System Company of Newark* v. *Lisena,* 106 N. J. L. 549; 150 Atl. Rep. 373."

* * * * * *

"Plaintiff below not only made out a *prima facie* case but also became entitled to the benefits conferred by that provision of our Negotiable Instrument Law which sets forth that 'every holder is deemed *prima facie* to be a holder in due course.' *N. J. S. A. 7:2-59.* It was incumbent upon the defendant to show that the instrument was not complete or regular on its face, or that the plaintiff became the holder after the due date of the instrument and with notice of its having been dishonored, or that plaintiff took the instrument in bad faith without paying value, or finally that at the time of negotiation to it, plaintiff had notice of an infirmity in the instrument or a defect in the title of the person who negotiates it. See *N. J. S. A.* 7:2-52 and *Fidelity Union Trust Co.* v. *Decker Building Material Co.,* 106 N. J. L. 132; 148 Atl. Rep. 717; *Byron* v. *Byron, Hefferman & Co.,* 98 N. J. L. 127; 119 Atl. Rep. 12."

In *Trustees System Co.* v. *Lisena,* 106 N. J. L. 549 (E. & A. 1930), cited in the *Crown Capital Corp.* case, *supra,* the New Jersey Court of Errors and Appeals held that, in an inquiry whether a note, recently given and still outstanding, has been paid, the burden of proof rests on the debtor. And in *Fidelity Union etc. Co.* v. *Decker, etc., Co.,* 106 N. J. L. 132 (E. & A. 1930), also relied upon in the *Crown Capital Corp.* case, *supra,* the Court of Errors and Appeals held that the legal presumption is that the holder of a negotiable instrument transferred to him, before maturity, is a *bona fide* holder for value, and the burden rests upon the defendant to establish otherwise, saying (106 N. J. L. 135):

"The burden was upon the appellants to establish, in order to escape liability, that the plaintiff-

> respondent had knowledge of the infirmity in the note in question at the time it was discounted, and further, that the proceeds of the said note had not been checked out by the bank."

Under the law of New Jersey respondents were required to establish the conditions expressly set forth in the presumption of death statute. When these conditions have been established (as they were here), the insured is presumed to be dead "unless it is proved he was alive within that time". And it is submitted that the Trial Court properly charged the jury that petitioners bore the burden of establishing that the insured was, in fact, alive within the statutory period and that the charge to the jury was in all respects proper and in accordance with the applicable law of New Jersey.

II.

The Circuit Court of Appeals, in correctly affirming the Trial Court's ruling with respect to the inadmissibility of the inventory and account of receiver (Ex. D-9) has not decided an important question of federal law which has not been, but should be considered by this Court.

At the trial of this cause, petitioners introduced testimony as to the financial troubles of the insured. Part of the evidence proffered was an inventory and account of receiver in the insolvency proceedings of the Discount Corporation (Ex. D-9, 86a, Vol. II; offered R. 347a). Petitioners' contention is that this document was excluded solely because

the provisions of the Act of June 20, 1936, 49 Stat. 1561 (U. S. C. A. Title 28, Sec. 695) were not properly interpreted and applied to this case. This is not so.

Petitioners fall into error at the outset of their argument by presuming that the conclusions contained in the proffered document were material and relevant to the present litigation. This exhibit was offered in support of petitioners' theory that the insured did not commit suicide, or to show a possible motive for the disappearance of the insured. In either case, this exhibit was not relevant or material to the actual issues involved in this suit, and when evidence of the insolvency proceedings of the Discount Corporation was offered, respondents objected thereto on the grounds that it was immaterial and irrelevant (R. 343a).

Throughout this litigation petitioners have endeavored to create the impression that respondents were attempting to prove death by suicide. This is not so (see colloquy between court and counsel, R. 321a). And any explanation of his absence has no effect whatever upon the presumption in New Jersey, for the statute of New Jersey has significantly omitted the phrase "unexplained absence", a component part of the common law rule, and which formed a part of the presumption involved in *Equitable Life Assur. Soc.* v. *Sieg*, 53 F. (2) 318 (C. C. A. 6th, 1931), cited and relied on by petitioners (Pet. Br., p. 28).

In *Meckert* v. *Prudential Ins. Co.*, 114 N. J. L. 320, (E. & A. 1934), Judge Kays said (114 N. J. L. 322):

> "Irrespective of the decisions by the courts of this state, counsel for appellant argues that the fact that the insured was a fugitive from justice overcomes the presumption of death to which the above-

> mentioned statute refers. The fact that the insured was wanted for forgery or other crimes may have been a motive for disappearing but such reason would not be sufficient for remaining away for a period of over seven years and, therefore, such fact would not overcome the presumption of death as a matter of law."

The clear language of the statute and the decision in the above case leads one to the inescapable conclusion that "the fact that he is a fugitive from justice or has had family or domestic difficulties, or has fled from the stigma of some disgrace has no effect upon the presumption of death if he has disappeared and not been heard from for the statutory period of seven years" (5 Mercer Beasley L. R., p. 7).

The express purpose for which the inventory of the receiver of the Discount Corporation was offered and the reasons for its exclusion by the Trial Court were (R. 344a):

> "The Court: This record, as I understand it, is offered for the limited purpose of establishing the fact that the Discount Corporation was insolvent.
>
> "Mr. Markley: Yes, sir.
>
> "The Court: At the time of his disappearance.
>
> "Mr. Markley: Absolutely.
>
> "Mr. Waldau: The final decree would do that.
>
> "Mr. Vanderbilt: May I be heard on that, your Honor?
>
> "The Court: Yes, you may.
>
> "Mr. Vanderbilt: This contains much more than that. What they want to prove is that there was a decree of insolvency and appointment of a receiver; they may readily do that by putting in evidence the decree. I will save them the time by admitting on

such and such a day that a receiver was appointed in the Court of Chancery of New Jersey, but that contains utterly extraneous matter, offered solely for the purpose of getting facts to the jury that they know they can't prove and which we had nothing to do with and no opportunity to be heard. A document which is full of speculation and conjectures. And, if your Honor desires, I would be glad to point out the particular parts that I think are open to that objection.

"The Court: Oh, yes. It is apparent on the face of it that the conclusions drawn by Mr. Farr are conclusions which can be drawn in this case only by the jurors.

"Mr. Vanderbilt: They are not complete.

"The Court: No, I am afraid that this particular document, which is the inventory and account of the receiver—inventory and account of the receiver is so filled with conclusions that might be prejudicial that I won't allow that particular document, *since your admitted purpose is to establish that the company was insolvent at the time* the absentee, Mr. Barnett, disappeared. The conclusion of the Court of Chancery as to that, which is embodied in the decree, should be ample to establish that fact." .

Petitioners' admitted sole purpose was to show that the Discount Corporation was insolvent at the time of the insured's disappearance. The decree of insolvency was received in evidence (Ex. D-10; offered R. 347a) and was read to the jury (R. 348a). Petitioners have not included this decree in the printed record. Insured's association with the Discount Corporation and its financial difficulties were fully presented to the jury, as were the facts that at the time of his disappearance it was discovered that the cor-

porate records were missing from the safe; that these had been in the possession and care of Barnett; and that Barnett was the only one who had access to the safe (R. 334a, 342a).

The Circuit Court of Appeals, in considering the Trial Court's ruling, said (R. 563):

> "The appellants offered in evidence a copy of the inventory of this particular company called 'The Discount Corporation'. It was offered for the purpose of showing that the company was insolvent at the time the assured disappeared. That fact was already in this trial record; the decree of the Court of Chancery to that effect being in evidence. The inventory contained conclusions of appraisers and an auditor. A criminal complaint and criminal indictment both against the defendant, were offered by the defense and rejected by the court.
>
> * * * * * *
>
> "There was no harmful error in the rejection of these documents."

Petitioners now urge that this Court should grant writs of certiorari on the ground that (Pet. p. 8) "The Circuit Court of Appeals in affirming the District Court's rejection of the inventory and account of receiver (Exhibit D-9) which was clearly admissible under 28 U. S. C. 695 has decided an important question of federal law which has not been but should be considered by this Court."

The Circuit Court of Appeals did not render any opinion relative to the applicability of the Act of June 20, 1936, 49 Stat. 1561 (U. S. C. A. Title 28, Sec. 695), for it is perfectly obvious that any such decision was wholly unneces-

sary in this case. Even assuming for the purposes of argument that this document was material and relevant, the Circuit Court of Appeals did not decide a novel question of law, but followed the recognized federal rule that an alleged error in excluding evidence as to a certain fact is harmless error and not grounds for reversal where the fact is established by other evidence;

Northern Pac. R. Co. v. *Mortenson,* 63 Fed. 530 (C. C. A. 8th, 1894); *Error dismissed,* 166 U. S. 997 (1896);
Drumm-Flato Commission Co. v. *Edmission,* 208 U. S. 534 (1908);
Cannon v. *Pratt,* 99 U. S. 619 (1878);
Proechel v. *U. S.,* 59 Fed. (2) 648 (C. C. A. 8th, 1932), *cert. den.* 287 U. S. 658 (1932).

The Circuit Court of Appeals, in affirming the Trial Court's ruling relative to this document, clearly did not decide an important question of federal law which has not been but should be considered by this Court.

Again assuming, but not conceding, for the purposes of argument that petitioners' position is sound, the inventory of the receiver of the Discount Corporations is patently inadmissible under the provisions of the Act of June 20, 1936, 49 Stat. 1561 (U. S. C. A. Title 28, Sec. 695) which provides:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made

> in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind (June 20, 1936, c. 640, Sec. 1, 49 Stat. 1561.)"

The object of this statute was to do away with technical rulings which excluded records ordinarily used in business transactions when not formally identified by the makers and to bring decisions of all federal courts into line with the modern rule that it is sufficient to show that the entry is contained in a book of regular entries maintained in the establishment without producing the particular person who made the entry and having him identify it, *Ulm* v. *Moore-McCormack Lines,* 115 Fed. (2d) 492, (C. C. A. 2d, 1940), *rehearing denied,* 117 Fed. (2d) 222 (1940), *Cert. den.* 313 U. S. 567 (1941); *Hoffman* v. *Palmer,* 129 Fed. (2d) 976 (C. C. A. 2d, 1942), *affirmed,* 318 U. S. 109 (1943).

When tested against the provisions of the above statute and its interpretation by this Court in *Palmer* v. *Hoffman,* 318 U. S. 109 (1943), the inventory and account of receiver is clearly inadmissible, even assuming this to be the sole basis for its exclusion.

Conclusion.

The decision of the Circuit Court of Appeals, affirming the Trial Court's charge to the jury, did not decide an important question of local law probably in conflict with local decisions, but acted in accordance with the applicable law of New Jersey. Nor did the Circuit Court of Appeals decide an important question of federal law arising under the Act of June 20, 1936, 49 Stat. 1561, which has not been but should be considered by this Court.

It is, therefore, respectfully submitted that this Court should deny the petition for writs of certiorari.

Respectfully submitted,

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